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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ILLINOIS DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

MARVIN FLOWERS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An Illinois jury, instructed with pattern jury instructions on murder and voluntary manslaughter, found Marvin Flowers guilty of murder on October 11, 1980. About ten years later, the Seventh Circuit held in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), that use of the twenty-year-old pattern instructions violated the Fourteenth Amendment's Due Process Clause because the instructions permitted a jury to find murder without considering evidence to support voluntary manslaughter, a lesser offense, as provided by state law. In *Flowers v. Illinois Department of Corrections*, 962 F.2d 703 (7th Cir. 1992), the decision below, the Seventh Circuit held that *Falconer v. Lane* did not announce a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989), thereby permitting Flowers to take advantage of *Falconer*'s holding retroactively in this habeas corpus action.

This petition presents the following questions for review:

1. Did the Seventh Circuit err by holding that existing precedent "dictated" *Falconer*'s holding under *Teague v. Lane* even though (a) many opinions from the Seventh Circuit, the Illinois Supreme Court, the Illinois Appellate Court and federal district courts irreconcilably conflict with *Falconer* on the constitutionality of the pattern instructions, (b) *Falconer* radically extends criminal defendants' Due Process rights by effectively requiring correct jury instructions on affirmative defenses provided by state law, and (c) other circuit courts have expressly rejected the *Falconer* court's reasoning?

2. When state law requires a judge to instruct a jury on a lesser offense if only "very slight evidence" supports the defense, does a federal court on habeas corpus review commit error by relying on the mere giving of the instruction in finding reversible error?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. *FALCONER v. LANE*, 905 F.2d 1129 (7th Cir. 1990), RADICALLY AND UNPREDICTABLY EXTENDED CONSTITUTIONAL LAW BY GRANTING CRIMINAL DEFENDANTS A DUE PROCESS RIGHT TO CORRECT JURY INSTRUCTIONS ON AN AFFIRMATIVE DEFENSE	6
A. The Pattern Jury Instructions at Issue	7
B. State and Federal Courts Have Disagreed Radically on the Constitutionality of the Instructions Invalidated in *Reddick*	9
C. *Falconer* and *Taylor* Radically Extend Criminal Defendants' Due Process Rights by Effectively Requiring Correct Jury Instructions on Affirmative Defenses Provided by State Law	13
D. Other Circuit Courts Have Expressly Rejected the *Falconer* and *Taylor* Courts' Reasoning	17

II.

THE MERE GIVING OF AN INSTRUCTION CANNOT CONSTITUTE REVERSIBLE ERROR WHEN STATE LAW REQUIRED THE TRIAL JUDGE TO GIVE THE INSTRUCTION EVEN IF ONLY "VERY SLIGHT EVIDENCE" SUPPORTED IT 19

CONCLUSION 21

APPENDICES

APP. PAGE

A—*Flowers v. Illinois Department of Corrections*, 962 F.2d 703 (7th Cir. 1992) 1

B—*People v. Flowers*, 138 Ill. 2d 218, 516 N.E.2d 674 (1990) 19

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES	PAGE(S)
Arizona v. Fulminante, 111 S. Ct. 1246 (1991) .	20
Beck v. Alabama, 447 U.S. 625 (1980)	15
Boyde v. California, 494 U.S. 370 (1990)	16, 18
Butler v. McKellar, 494 U.S. 407 (1990)	7, 12
Connecticut v. Johnson, 460 U.S. 73 (1983)	14
Cupp v. Naughten, 414 U.S. 141 (1973)	16, 18
Engle v. Isaac, 456 U.S. 107 (1982)	11, 13, 14, 17
Delaware v. Van Arsdall, 475 U.S. 673 (1986) ...	20
Martin v. Ohio, 480 U.S. 228 (1987) ..	11, 12, 13, 14, 15, 17
Patterson v. New York, 432 U.S. 197 (1977)	11, 12, 13, 14, 17
Penry v. Lynaugh, 492 U.S. 302 (1989)	7
Pope v. Illinois, 481 U.S. 497 (1987)	20
Sawyer v. Smith, 110 S. Ct. 2822 (1990)	7, 9, 12
Stringer v. Black, 112 S. Ct. 1130 (1992)	7
Teague v. Lane, 489 U.S. 288 (1989)	*passim*

OTHER CASES	
Allen v. Redman, 858 F.2d 1194 (6th Cir. 1988) ..	18
Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990)	*passim*
Flowers v. Illinois Dep't of Corrections, 767 F. Supp. 880 (N.D. Ill. 1991)	2, 4

Flowers v. Illinois Dep't of Corrections, 962 F.2d 703 (7th Cir. 1992) ..... *passim*

People v. Arnold, 139 Ill. App. 3d 429, 487 N.E.2d 997 (1st Dist. 1985) 19

People v. Bolden, 181 Ill. App. 3d 481, 536 N.E.2d 1308 (4th Dist.), *appeal denied*, 542 N.E.2d 116 (Ill. 1989) 9

People v. Brooks, 175 Ill. App. 3d 136, 529 N.E.2d 732 (1st Dist. 1988), *appeal denied*, 124 Ill. 2d 557, 535 N.E.2d 916 (1989) 10

People v. Flowers, 109 Ill. App. 3d 1211, 451 N.E.2d 1039 (1st Dist. 1982) 1

People v. Flowers, 192 Ill. App. 3d 292, 548 N.E.2d 766 (1st Dist. 1989) 2, 3

People v. Flowers, 138 Ill. 2d 218, 561 N.E.2d 674 (1990) 2, 4, 6, 10, 14

People v. Garcia, 169 Ill. App. 3d 618, 523 N.E.2d 992 (1st Dist.), *appeal denied*, 122 Ill. 2d 584, 530 N.E.2d 255 (1988) 19, 20

People v. Howard, 139 Ill. App. 3d 755, 487 N.E.2d 656 (2d Dist. 1985) 9

People v. McGee, 110 Ill. App. 3d 766, 443 N.E.2d 1057 (2d Dist. 1982) 9

People v. Reddick, 123 Ill. 2d 184, 526 N.E.2d 141 (1988) ..... *passim*

People v. Shields, 143 Ill. 2d 435, 575 N.E.2d 538 (1991) 10

People v. Taylor, 181 Ill. App. 3d 538, 536 N.E.2d 1312 (4th Dist.), *appeal denied*, 545 N.E.2d 127 (Ill. 1989) 9

People v. Williams, 205 Ill. App. 3d 751, 563 N.E. 2d 762 (1st Dist. 1989) 19

Rose v. Lane, 910 F.2d 400 (7th Cir.), *cert. denied*, 111 S. Ct. 515 (1990) 19

Taylor v. Gilmore, 954 F.2d 441 (7th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3783 (May 19, 1992) (No. 91-1738) ..... *passim*

United States ex rel. Fleming v. Gramley, 735 F. Supp. 302 (C.D. Ill. 1990), *rev'd sub nom. United States ex rel. Fleming v. Huch*, 924 F.2d 679 (7th Cir. 1991) 9

United States ex rel. Fleming v. Huch, 924 F.2d 79 (7th Cir. 1991) 10, 19

Walker v. Endell, 850 F.2d 470 (9th Cir.), *cert. denied*, 488 U.S. 926 (1988) 18

Wood v. Marshall, 790 F.2d 548 (6th Cir. 1986), *cert. denied*, 479 U.S. 1036 (1987) 18

FEDERAL CONSTITUTION AND STATUTES

U.S. CONST. amend. XIV, § 1 2

28 U.S.C. § 1254(1) (1988) 2

28 U.S.C. § 2254 (1988) 2

ILLINOIS STATUTES

Ill. Rev. Stat. ch. 38, ¶ 7-1 (1985) 8

Ill. Rev. Stat. ch. 38, ¶ 9-1 (1985) 7

Ill. Rev. Stat. ch. 38, ¶ 9-2 (1985) 7, 8

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on May 7, 1992.

OPINIONS BELOW

The October 11, 1980, order of the Circuit Court of Cook County, Illinois, and the November 1, 1982, decision of the Illinois Appellate Court are unpublished. *See People v. Flowers*, 109 Ill. App. 3d 1211, 451 N.E.2d 1039 (1st Dist. 1982) (decision table). The February 1, 1983, order of the Illinois Supreme Court denying Flowers leave to appeal is unpublished. The Circuit Court of Cook County's August 12, 1986, denial of Flowers's petition for post-conviction relief is unpublished. The December 18, 1989,

decision of the Illinois Appellate Court is published at 192 Ill. App. 3d 292, 548 N.E.2d 766 (1st Dist. 1989) ("*Flowers I*"). The September 26, 1990, decision of the Illinois Supreme Court is published at 138 Ill. 2d 218, 561 N.E.2d 674 (1990) ("*Flowers II*"), and is reprinted in the appendix to this petition at pages App. 19 to App. 38. The May 16, 1991, decision of the United States District Court for the Central District of Illinois is published at 767 F. Supp. 880 (N.D. Ill. 1991) ("*Flowers III*"). The May 7, 1992, decision of the United States Court of Appeals for the Seventh Circuit is reported at 962 F.2d 703 (7th Cir. 1992) ("*Flowers IV*"), and is reprinted in the appendix to this petition at pages App. 1 to App. 17.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on May 7, 1992 (App. 18). The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case puts in issue the Fourteenth Amendment's Due Process Clause: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. The case also puts in issue 28 U.S.C. § 2254 (1988): "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution . . . of the United States."

STATEMENT OF THE CASE

I. Flowers's State Criminal Trial and Appeal.

In 1979, Marvin Flowers repeatedly clubbed Robert Murray with a baseball bat until Murray died. Flowers then stole Murray's car, along with other items, and drove away. An Illinois jury found Flowers guilty of murder, armed violence and armed robbery on October 11, 1980, and the Circuit Court of Cook County accordingly sentenced him to concurrent forty- and fifteen-year sentences. Flowers appealed to the Illinois Appellate Court, which affirmed on November 1, 1982, in an unpublished order. The Illinois Supreme Court denied his petition for leave to appeal on February 1, 1983.

II. Flowers's State Post-conviction Hearing and Appeal.

Flowers then filed a petition for post-conviction relief under the Illinois Post-conviction Hearing Act, which the Circuit Court of Cook County denied on August 12, 1986. Flowers again appealed to the Illinois Appellate Court. After Flowers filed his appeal, the Illinois Supreme Court issued its opinion in *People v. Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988), which appeared to invalidate the pattern murder and voluntary manslaughter instructions used at Flowers's trial on state law grounds.

The Illinois Appellate Court reversed, granting Flowers's petition for post-conviction relief. The court noted that *Reddick* would not automatically apply to Flowers's conviction because the Illinois Supreme Court decided it while Flowers's case was on appeal. *Flowers I*, 548 N.E.2d at 769. Believing, however, that *Reddick* "was clearly predicated upon well-settled principles of law," the court applied *Reddick* retroactively. *Id.*

The Illinois Supreme Court reversed. The court affirmed the lower court's decision that *Reddick* had announced a holding grounded in federal constitutional law rather than just state criminal law. It cited the Seventh Circuit's recent decision in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), to support that holding. The court refused, however, to apply *Reddick* retroactively. The court adopted, for Illinois post-conviction relief claims, this Court's holding in *Teague v. Lane*, 489 U.S. 288 (1989). Finding that *Reddick* announced a "new rule" under *Teague*, it refused to apply the rule retroactively. *Flowers II*, 561 N.E.2d at 681-84 (App. 33-38).

III. Flowers's Federal Habeas Corpus Proceeding.

Flowers proceeded to federal court, filing a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. That court completely rejected the Illinois Supreme Court's *Teague v. Lane* analysis, holding that the Illinois Supreme Court had asked the wrong question in analyzing retroactivity. The issue, in the district court's opinion, was not whether *Reddick* should apply retroactively, but whether *Falconer* should apply retroactively. *Flowers III*, 767 F. Supp. at 894. Finding that *Falconer* did not announce a new rule under *Teague*, the court granted Flowers's petition. *Id.*

The Seventh Circuit affirmed in the decision below, citing its recent decision in *Taylor v. Gilmore*, 954 F.2d 441 (7th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3783 (May 19, 1992) (No. 91-1738).[1] *Flowers IV*, 962 F.2d at 705 (App. 4). Judge Easterbrook concurred. Although he

[1] On June 9, 1992, this Court requested a brief in opposition to the *Taylor* petition for certiorari.

believed that stare decisis required the court to follow current Seventh Circuit precedent, Judge Easterbrook argued that a *Reddick* error does not violate the Due Process Clause at all. *Id.* at 707-12 (App. 7-17).

The Illinois Department of Corrections seeks a writ of certiorari from this Court to review this judgment and opinion of the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

The decision below has ominous national implications. In this habeas corpus action, the Seventh Circuit retroactively applied an earlier case that invalidated, on novel constitutional grounds, pattern murder jury instructions that state and federal courts had considered constitutional for twenty years. In doing so, the court severely limited the scope of *Teague v. Lane*, 489 U.S. 288 (1989), in which the Court held that a case announces a "new rule" when "the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* at 301 (plurality opinion). The Court should review this issue to reverse the Seventh Circuit's momentous decision below and to resolve a circuit split on the proper scope of the Due Process Clause.

The lower court's harmless error decision also requires reversal because it fundamentally misapplies harmless error analysis. In finding reversible error, the Seventh Circuit erroneously assumed that the state court's decision to give the jury instruction necessarily meant "that the evidence presented at trial could support either a voluntary manslaughter verdict or a murder verdict." *Flowers IV*, 962 F.2d at 706 (App. 4-5). That statement is patently untrue under settled Illinois law. If allowed to stand, the decision below effectively clears the way for hundreds of con-

victed murderers to by-pass the harmless error standard for this jury instruction error. This Court should prevent such a calamity from occurring by reversing the Seventh Circuit's incorrect decision below.

I.

FALCONER v. LANE, 905 F.2d 1129 (7th Cir. 1990), RADICALLY AND UNPREDICTABLY EXTENDED CONSTITUTIONAL LAW BY GRANTING CRIMINAL DEFENDANTS A DUE PROCESS RIGHT TO CORRECT JURY INSTRUCTIONS ON AN AFFIRMATIVE DEFENSE.

In holding that *Falconer v. Lane* announced an old rule that applies retroactively, the Seventh Circuit dismissed rank confusion in the state and federal courts about why these twenty-year-old pattern jury instructions used at Flowers's trial might violate the Constitution. Indeed, after a series of inconsistent opinions from the Seventh Circuit itself, Judge Easterbrook concurred below specifically to argue that the instructions do not violate the Due Process Clause at all. 962 F.2d at 707-12 (App. 7-17) (Easterbrook, J., concurring). He noted that the Seventh Circuit was "at loggerheads with the Supreme Court of Illinois, which held in this very case . . . that [*Reddick*] would not [apply retroactively]." *Id.* at 707 (App. 7) (citations omitted). *See Flowers II*, 561 N.E.2d at 683 (App. 36-37) (finding that *Reddick* announced a new rule of criminal procedure). These facts alone establish that *Falconer* announced a new rule under *Teague v. Lane*.

Moreover, even if *Falconer* correctly revealed a constitutional problem with these instructions, no decision of this Court "dictated" that result. To the contrary, *Falconer* oppugns a line of cases from this Court that suggest that criminal defendants have no Due Process right to affirmative defense instructions required by state law. Further-

more, *Falconer* is patently inconsistent with cases from other circuits that have relied on this same line of cases when faced with similar issues. *Falconer* established a starkly new rule of criminal procedure that the court should not have applied retroactively to Flowers's conviction.

A federal court generally cannot grant habeas corpus relief to a prisoner based on a "new rule" of criminal procedure. *Teague v. Lane*, 489 U.S. at 301 (plurality opinion); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989). A decision announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. *Stringer v. Black*, 112 S. Ct. 1130, 1135 (1992). If "reasonable jurists may disagree" as to whether an earlier decision "dictates" a later one, then the later decision announced a "new rule" under *Teague*. *Sawyer v. Smith*, 110 S. Ct. 2822, 2827 (1990). As the Court explained in *Butler v. McKellar*, 494 U.S. 407 (1990), "[t]he 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Id.* at 414. Under these settled principles, the Seventh Circuit erred by holding that *Falconer* announced an old rule that it could apply retroactively to Flowers's conviction.

A.

The Pattern Jury Instructions at Issue.

Under the Illinois Criminal Code of 1961 (the "Code"), a person committed murder if he killed someone with an intent to kill or commit great bodily harm. Ill. Rev. Stat. ch. 38, ¶ 9-1 (1985). In another statutory section, the Code also provided for a lesser crime of voluntary manslaughter. Ill. Rev. Stat. ch. 38, ¶ 9-2 (1985). A person

committed voluntary manslaughter rather than murder if the evidence established the two elements of murder noted above as well as a "mitigating circumstance." *See People v. Reddick*, 123 Ill. 2d 184, 193-97, 526 N.E.2d 141, 144-45 (1988). The Code provided for two mitigating circumstances: (a) that the defendant killed while acting under sudden and intense passion resulting from serious provocation, or (b) that the defendant had an unreasonable belief at the time of the killing that he had to protect himself. Ill. Rev. Stat. ch. 38, ¶ 9-2 (1985).[2]

In *Reddick*, the Illinois Supreme Court held that the mitigating circumstances described in the Code were partial affirmative defenses to a murder charge. *Reddick*, 123 Ill. 2d at 195-96, 526 N.E.2d at 145-46. The court held that defendants have the burden of producing evidence to warrant the instruction on voluntary manslaughter, but once the defendant raised the issue, the State had the burden of disproving the existence of the mitigating circumstance beyond a reasonable doubt. *Id.*, 123 Ill. 2d at 197, 526 N.E.2d at 146. The pattern jury instructions on these crimes—first published in 1968 and likely used in hundreds of criminal trials—did not accurately reflect the burdens of proof that the *Reddick* court announced. Accordingly, the *Reddick* court invalidated them. *Id.*, 123 Ill. 2d at 197, 526 N.E.2d at 146. Flowers's jury was instructed with the same instructions invalidated on state-law grounds in *Reddick*.

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[2] If the defendant had a *reasonable* belief that he had to defend himself (*i.e.*, if he acted in self-defense), a separate section of the Code provided for full acquittal. Ill. Rev. Stat. ch. 38, ¶ 7-1 (1985).

B.

State and Federal Courts Have Disagreed Radically on the Constitutionality of the Instructions Invalidated in *Reddick*.

Since *Reddick*, federal and state courts, including the Seventh Circuit itself as well as the Illinois Supreme Court, have issued markedly inconsistent opinions as to whether *Reddick* errors violate the Due Process Clause. Because disagreement among reasonable jurists establishes that a constitutional principle is "new" under *Teague*, *Falconer* announced a new rule. *Sawyer*, 110 S. Ct. at 2827.

Before the Seventh Circuit decided *Falconer*, many courts held that a *Reddick* error did not violate the Due Process Clause. These courts typically reasoned that, if anything, a *Reddick* error deprived a defendant of an affirmative defense, and the Due Process Clause does not guarantee defendants the right to receive an affirmative defense instruction. *See, e.g., People v. Bolden*, 181 Ill. App. 3d 481, 487-88, 536 N.E.2d 1308, 1311-12 (4th Dist.), *appeal denied*, 542 N.E.2d 116 (Ill. 1989); *People v. Taylor*, 181 Ill. App. 3d 538, 540, 536 N.E.2d 1312, 1313 (4th Dist.), *appeal denied*, 545 N.E.2d 127 (Ill. 1989); *United States ex rel. Fleming v. Gramley*, 735 F. Supp. 302, 305-08 (C.D. Ill. 1990), *rev'd sub nom. United States ex rel. Fleming v. Huch*, 924 F.2d 679 (7th Cir. 1991). *See also People v. McGee*, 110 Ill. App. 3d 766, 775, 443 N.E.2d 1057, 1063-64 (2d Dist. 1982) (affirming convictions on direct review after trials using the pattern instructions); *People v. Howard*, 139 Ill. App. 3d 755, 760-61, 487 N.E.2d 656, 660-61 (2d Dist. 1985) (same). As the *Bolden* Court explained, "No United States Supreme Court case has held that due process is denied when an imperfect instruction is given in regard to an included offense." 181 Ill. App. 3d at 487, 536 N.E.2d at 1312.

Other courts, however, including the Seventh Circuit and the Illinois Supreme Court, disagreed with this reasoning. These courts held that the *Reddick* court reversed on constitutional rather than state-law grounds even though the instructions related to an affirmative defense. *See, e.g.*, *Falconer v. Lane*, 905 F.2d at 1134 & n.5; *Flowers II*, 138 Ill. 2d at 235-37, 561 N.E.2d at 680-81 (App. 31-33); *People v. Shields*, 143 Ill. 2d 435, 442-43, 575 N.E.2d 538, 542 (1991); *People v. Brooks*, 175 Ill. App. 3d 136, 142, 529 N.E.2d 732, 736 (1st Dist. 1988), *appeal denied*, 124 Ill. 2d 557, 535 N.E.2d 916 (1989).

These courts either held or strongly suggested that *Reddick* itself announced a Due Process holding, because the *Reddick* court considered the jury instruction error to violate a defendant's alleged fundamental right to accurate jury instructions. As the *Falconer* court stated, "[a]lthough the *Reddick* Court itself did not use the magic words 'due process' as the petitioner did, the Court obviously considered the errors resulting from the invalid instructions to be of constitutional magnitude." 905 F.2d at 1134. The court explicitly approved of various Illinois Appellate Court decisions, including *People v. Brooks*, which held that *Reddick* announced a constitutional rule because "[t]he right of an accused to have the State prove all the elements of his alleged crime is incontestably of constitutional dimension." *Brooks*, 175 Ill. App. 3d at 142, 529 N.E.2d at 736 (citation omitted). *See Falconer*, 905 F.2d at 1134 & n.5 (adopting *Brooks* and other Illinois Appellate Court decisions).

As the Seventh Circuit later recognized, however, "an ambiguity exist[ed] as to the precise nature of the due process violation." *United States ex rel. Fleming v. Huch*, 924 F.2d 679, 682 (7th Cir. 1991). In particular, earlier statements in the Seventh Circuit's decisions never ex-

plained why *Reddick* errors did not merely violate state law since, at most, they deprived a defendant of his state-law right to present an affirmative defense. *See Patterson v. New York*, 432 U.S. 197, 210 (1977) (state need not "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused"); *Engle v. Isaac*, 456 U.S. 107, 119-21 (1982) (jury instruction error could not be challenged on habeas review because it related to an affirmative defense, not an element of the crime); *Martin v. Ohio*, 480 U.S. 228, 233 (1987) (states may shift burden of proving self-defense to accused in homicide case). *See infra* § I.C., pp. 13-17.

Only in *Taylor v. Gilmore*, 954 F.2d 441 (7th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3783 (May 19, 1992) (No. 91-1738), did the Seventh Circuit finally clarify why it believed that using these instructions violated the Constitution. The court held that constitutional error occurred because (a) a reasonable likelihood existed that the jury applied the challenged instruction in "an invalid manner," and (b) the jury might not have "weigh[ed] evidence that may have led to an acquittal on the charge of conviction." 954 F.2d at 452-53.

This novel holding went far beyond the earlier, irreconcilable efforts to resolve this issue by the Seventh Circuit, the Illinois Supreme Court, the Illinois Appellate Court, and the federal district courts in Illinois. Indeed, Judge Easterbrook below charged the *Taylor* court with "abandon[ing]" *Falconer*'s holding and substituting a new one, with which he also disagreed. 962 F.2d at 709-12 (Easterbrook, J., concurring) (App. 11-17). Because many reasonable jurists had addressed this issue but had arrived at divergent results, neither *Falconer* nor *Taylor*,

which modified *Falconer*'s holding, were "dictated" by existing precedent.

Judge Easterbrook concurred below specifically because he thought that the Seventh Circuit erred in *Falconer* and *Taylor* by finding a Due Process violation. 962 F.2d at 707-12 (App. 7-17) (Easterbrook, J., concurring). He explained: "[I]f a state could choose to do something—choose, for example, to make self-defense an affirmative defense to murder . . .—then the federal inquiry is over; whether the state has indeed so chosen is a question of its domestic law." *Id.* at 711 (App. 15) (citing *Patterson* and *Martin*). Although some panels of the Seventh Circuit believe that *Reddick* errors violate the Due Process clause, Judge Easterbrook does not. As a "reasonable jurist[ ]," Judge Easterbrook's concurrence below necessarily means that *Falconer* and *Taylor* established a new rule. *Sawyer*, 110 S. Ct. at 2827.

In holding that *Falconer* did not announce a new rule under *Teague*, the Seventh Circuit has effectively declared that Judge Easterbrook's concurrence, as well as earlier opinions of the Seventh Circuit, the Illinois Supreme Court, the Illinois Appellate Court and the federal district court, were products of unreasonable jurists. *Sawyer*, 110 S. Ct. at 2827; *Butler v. McKellar*, 494 U.S. 407, 415 (1990). This holding cannot stand. These judges did not reach divergent opinions because they were "unreasonable"; to the contrary, the opinions differ because the courts were simply grappling with how best to apply existing precedent, which does not squarely resolve the constitutional question presented by these pattern instructions. Accordingly, *Falconer* and *Taylor* present a quintessentially new rule under *Teaque*. This Court should issue a writ of certiorari to correct the Seventh Circuit's error and to preclude the federal courts from applying *Falconer*'s

novel holding to potentially hundreds of long-final murder convictions in Illinois.

C.

Falconer and _Taylor_ Radically Extend Criminal Defendants' Due Process Rights by Effectively Requiring Correct Jury Instructions on Affirmative Defenses Provided by State Law.

Falconer and *Taylor* held that use of these instructions violated a defendant's right to Due Process despite *Patterson v. New York*, 432 U.S. 197 (1977), *Engle v. Isaac*, 456 U.S. 107 (1982), and *Martin v. Ohio*, 480 U.S. 228 (1987), all of which strongly suggest that a defendant has no such Due Process right. Indeed, two circuits have rejected arguments that the Seventh Circuit applied in *Falconer* and *Taylor* specifically because of *Patterson* and later cases. *See infra* § I.D., pp. 17-19. Even if the Seventh Circuit correctly decided *Falconer* and *Taylor*, therefore, they announced a new rule because they went far beyond earlier pronouncements of this Court on the scope of a criminal defendant's Due Process right to an affirmative defense jury instruction.

Since *Patterson v. New York*, this Court has held, apparently uniformly, that in noncapital cases the Due Process Clause requires proof beyond a reasonable doubt of the elements of a charged offense, but affirmative defenses are matters of state law. In *Patterson*, for example, the Court held that a state could legitimately, under the Due Process Clause, place the burden of proof of an affirmative defense upon a defendant. 432 U.S. at 205-11. Similarly, in *Engle v. Isaac*, the Court held that jury instructions that violated state law by placing the burden of proof of an affirmative defense upon a defendant did not violate the Due Process Clause. 456 U.S. at 119-21. Lastly, in *Martin v. Ohio*, the Court held that a state may place

the burden of proof of an affirmative defense on a defendant even if evidence that supports the affirmative defense would negate one of the elements of the charged offense. 480 U.S. at 233-36.

Falconer and *Taylor* contradict the rationale of these cases. If the Due Process Clause allows states to convict defendants with jury instructions that misallocate the burden of proof of an affirmative defense *(Engle v. Isaac*, 456 U.S. at 119-21), then the Due Process Clause should also allow states to convict defendants with instructions that effectively deprive a defendant of an affirmative defense. *Falconer* and *Taylor* announce holdings directly contrary to this reasoning. Even if *Falconer* and *Taylor* are correct, therefore, *Engle*, *Patterson* and *Martin* dispel any possibility that existing precedent "dictated" their constitutional holdings. Indeed the Illinois Supreme Court reached this very result. *See Flowers II*, 561 N.E.2d at 683 (holding that *Reddick* will not apply retroactively, in part, because *Reddick*'s constitutional holding "did not necessarily flow" from its statutory analysis given *Patterson*).

The *Taylor* court, addressing the retroactivity of *Falconer*, relied on *Connecticut v. Johnson*, 460 U.S. 73 (1983), to hold that "permitting a jury to reach a murder verdict without considering evidence that would warrant mitigation to voluntary manslaughter . . . violates due process." 954 F.2d at 453. As the court itself recognized, however, *Johnson* involved instructions on an element of a crime, not an affirmative defense. *Id.* The court considered this distinction from *Johnson* "insignificant," however, stating:

> What ultimately mattered in *Johnson* was that the jury could not weigh evidence that may have led to an acquittal on the charge of conviction—regardless of whether the evidence related to an element of the

> crime or an affirmative defense. In a state that defines manslaughter and murder as separate crimes, and at a trial where a defendant is constitutionally entitled to voluntary manslaughter instructions, a homicide committed under a sudden and intense passion is no more a murder than a homicide committed without the intent to kill.

Id. This passage misapplies the law for at least three reasons.

First, to the extent that the pattern instructions might prevent the jury from acquitting the defendant of murder even though he presented evidence of an affirmative defense, the instructions only violated state law. The Due Process Clause does not place on a state the burden of proving the absence of an affirmative defense, even if the existence of the affirmative defense might negate an element of the charged crime. *Martin v. Ohio*, 480 U.S. at 233-36. It necessarily follows that a defendant has no Due Process right to have a jury consider evidence that is only relevant to an affirmative defense.

Second, the *Taylor* court cited no authority for the proposition that a defendant is "constitutionally entitled to voluntary manslaughter instructions." 954 F.2d at 453. This Court has apparently never held that criminal defendants have such a right in noncapital cases. *See Beck v. Alabama*, 447 U.S. 625, 637 (1980) (noting that the Court has "never held that a defendant is entitled to a lesser included offense instruction as a matter of due process").

Third, although the court correctly stated that a homicide committed "under a sudden and intense passion is no more a murder than a homicide committed without the intent to kill" (954 F.2d at 453), the issue in a habeas corpus case is not whether the habeas petitioner committed murder; the issue is whether the conviction violates

the Constitution. Whether evidence establishes murder under state law is a fundamentally different question from whether the Constitution requires that the jury instructions permit the jury to consider that evidence. As Judge Easterbrook concluded below, "*If* Illinois wishes to use these instructions, it may; *whether* it wishes to do so is none of our business." 962 F.2d at 712 (App. 17) (Easterbrook, J., concurring).

The *Taylor* court also justified its holding on another line of cases from this Court which control the scope of habeas review of improper jury instructions. The court never acknowledged, however, that this Court has apparently never applied this second line of cases to instructions that effectively deprive a defendant of only an affirmative defense.

The Due Process Clause requires a new trial when "an ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). In reviewing jury instructions, a collateral court must assess "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990). The Seventh Circuit purported to apply this rule in *Taylor*, but restated the *Boyde* test in a novel and expansive way. Rather than asking whether the jury was likely to have applied the instruction in a way "that prevents its consideration of constitutionally relevant evidence," as the Court stated in *Boyde*, the court inquired whether the jury was likely to have applied the instruction "in an invalid manner," by which it meant in a manner that deprived the defendant of an affirmative defense permitted by state law. 954 F.2d at 452-53.

This slight difference in wording makes the *Falconer* and *Taylor* holdings radical indeed. A *Reddick* error prejudices a defendant because the instructions effectively prevent a jury from considering, as required by state law, the lesser crime of voluntary manslaughter as an alternative to murder. *Falconer*, 905 F.2d at 1136. But, as this Court's reasoning in *Patterson* and later cases suggests, defendants have no Due Process rights to jury instructions on affirmative defenses in noncapital cases. *Engle v. Isaac*, 456 U.S. at 119-21; *Patterson v. New York*, 432 U.S. at 210; *Martin v. Ohio*, 480 U.S. at 233. It may have been "invalid" under *state* law for the pattern instructions to prevent Flowers's jury from considering evidence of voluntary manslaughter; such evidence is plainly not, however, "constitutionally relevant evidence" under *Patterson*.

D.

Other Circuit Courts Have Expressly Rejected the *Falconer* and *Taylor* Courts' Reasoning.

At least two circuits have properly rejected the reasoning contained in *Taylor*'s restatement of the *Falconer* holding specifically because of *Patterson* and its progeny. This circuit split illustrates the national dilemma posed by the decision below, which found *Taylor* controlling. In at least two circuits, criminal defendants have no right to correct jury instructions relating to an affirmative defense in any circumstance because affirmative defenses are the subject of state law under *Patterson*. The Seventh Circuit's decision below, however, confirms that criminal defendants not only have such a right despite *Patterson*, but that the existence of this Due Process right was dictated by this Court's precedent. This Court should grant certiorari to correct the Seventh Circuit's error and resolve the split in the circuits over this fundamental rule of criminal procedure.

Both the Sixth and the Ninth Circuits have rejected the reasoning underlying the court's decision below. In *Allen v. Redman*, 858 F.2d 1194 (6th Cir. 1988), for example, the habeas petitioner argued that his state jury instruction on the affirmative defense of insanity was incorrect in that it permitted the jury to convict him of the charged crime without considering his sanity. He argued that the instruction completely "infected" the trial so as to deprive him of Due Process under *Cupp*. The court rejected his argument, holding that "the language from *Cupp*, stating that the 'resulting conviction violates due process,' brings the analysis . . . back to whether sanity is an element of the crimes involved." 858 F.2d at 1200. Because sanity was not an element of the charged crime, the *Cupp-Boyde* rule did not apply in the petitioner's case. *Id. See also Wood v. Marshall*, 790 F.2d 548, 551-52 (6th Cir. 1986), *cert. denied*, 479 U.S. 1036 (1987) (confusing jury instructions on an affirmative defense to murder could not violate Due Process).

Similarly, in *Walker v. Endell*, 850 F.2d 470 (9th Cir.), *cert. denied*, 488 U.S. 926 & 981 (1988), the petitioner argued that Due Process required correct instructions on "criminal recklessness." *Id.* at 475-76. Criminal recklessness only negated the defense of duress, however, and therefore was not an element of the charged crime. *Id.* at 476. Accordingly, the court held that "the failure to give an instruction defining recklessness is at most an error of state law." *Id.*

Walker, *Wood* and *Allen* all reach the opposite conclusion of *Falconer*, *Taylor* and the decision below, *i.e.*, that confusing or incorrect jury instructions that at most deprive a defendant of an affirmative defense can still violate the Due Process Clause. Given this dispute among

reasonable jurists as to the scope of Due Process limitations on incorrect affirmative defense jury instructions, *Falconer*'s holding (as clarified in *Taylor*) constitutes a new rule under *Teague*. This Court's grant of certiorari would allow it to resolve this circuit conflict over the scope of the Due Process Clause.

II.

THE MERE GIVING OF AN INSTRUCTION CANNOT CONSTITUTE REVERSIBLE ERROR WHEN STATE LAW REQUIRED THE TRIAL JUDGE TO GIVE THE INSTRUCTION EVEN IF ONLY "VERY SLIGHT EVIDENCE" SUPPORTED IT.

The lower court stated that the Illinois trial judge had an "apparent belief . . . that the evidence presented at trial could support either a voluntary manslaughter verdict or a murder verdict" simply because "he tendered a voluntary manslaughter instruction to the jury." 962 F.2d at 708 (App. 4). The Seventh Circuit has applied similar reasoning in all its *Reddick* cases. *Taylor*, 954 F.2d at 454 (finding the pattern instructions "inherently prejudicial"); *United States ex rel. Fleming v. Huch*, 924 F.2d at 683 (same); *Rose v. Lane*, 910 F.2d 400, 403 (7th Cir.), *cert. denied*, 111 S. Ct. 515 (1990) (same); *Falconer*, 905 F.2d at 1136-37 ("[T]he trial court determined that the jury should have the opportunity to return a verdict of voluntary manslaughter"). In doing so, it has fundamentally misapplied Illinois law.

At Flowers's trial, the judge had to tender the voluntary manslaughter instruction if even "very slight evidence" supported the charge. *People v. Williams*, 205 Ill. App. 3d 751, 765, 563 N.E.2d 762, 770 (1st Dist. 1989); *People v. Arnold*, 139 Ill. App. 3d 429, 434, 487 N.E.2d 997, 1000 (1st Dist. 1985); *People v. Garcia*, 169 Ill. App.

3d 618, 620, 523 N.E.2d 992, 994 (1st Dist.), *appeal denied*, 122 Ill. 2d 584, 530 N.E.2d 255 (1988). By the case below and its predecessors, however, whenever only "very slight evidence" supports voluntary manslaughter, a *Reddick* error cannot be harmless simply because the trial judge decided to tender the instruction to the jury. The existence of "very slight evidence" of voluntary manslaughter, however, plainly does not preclude a jury from finding that the defendant actually committed murder. The Seventh Circuit's declared method of harmless error analysis for *Reddick* errors, therefore, presumes prejudice; it does not even address the only relevant question, *i.e.*, whether "it can be said beyond a reasonable doubt that the jury's verdict . . . was not affected by the erroneous instruction." *Pope v. Illinois*, 481 U.S. 497, 502 (1987).

The harmless error doctrine "preserve[s] the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.' " *Arizona v. Fulminante*, 111 S. Ct. 1246, 1264 (1991) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)). The Seventh Circuit has thwarted this policy by summarily dismissing the very real chance that a jury would have found a defendant guilty of murder even though the law technically required a manslaughter instruction. The Court should grant certiorari to reverse the Seventh Circuit's decision.

CONCLUSION

The Seventh Circuit's decision contravenes this Court's precedent, solidifies a circuit split on a fundamental rule of criminal procedure, and wrongly gives a colorable habeas corpus claim to potentially hundreds of convicted murderers. Moreover, it fundamentally misapplies the harmless error standard required by numerous decisions of this Court. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 91-2330 and 91-2415

MARVIN FLOWERS,

Petitioner-Appellant
Cross-Appellee,

v.

ILLINOIS DEPARTMENT OF CORRECTIONS,

Respondent-Appellee
Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 6505—**William T. Hart**, *Judge*.

ARGUED JANUARY 7, 1992—DECIDED MAY 7, 1992

Before POSNER and EASTERBROOK, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge*.

ESCHBACH, *Senior Circuit Judge*. An Illinois jury convicted Marvin Flowers of murder under a version of murder and voluntary manslaughter instructions found constitutionally deficient by this court in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), and earlier found statutorily deficient by the Illinois Supreme Court in *People v. Reddick*, 123 Ill.2d 184, 526 N.E.2d 141 (1988). After exhausting his state remedies, Flowers petitioned for federal habeas corpus relief, claiming that his Fourteenth Amendment due process rights were violated by the written and

oral instructions tendered to the jury and that his rights against double jeopardy, as guaranteed to him by the Fifth and Fourteenth Amendments, were violated in the state proceedings. The district court granted Flowers relief on the due process grounds, vacating his murder conviction, but denied relief on the double jeopardy ground, thereby allowing Illinois to retry Flowers within ninety days. Both Flowers and Illinois appealed, and their appeals were consolidated for our review. For the reasons that follow, we affirm.

I.

The facts of this case have been detailed extensively in several reported opinions including Judge Hart's comprehensive order below, *see United States ex rel. Marvin Flowers v. Illinois Department of Corrections*, 767 F. Supp. 880 (N.D. Ill. 1991); consequently, we will not repeat them here except as necessary for our discussion. *See also People v. Flowers*, 192 Ill.App.3d 292, 548 N.E.2d 766 (1989) (ordering new murder trial) [*Flowers I*]; *People v. Flowers*, 138 Ill.2d 218, 561 N.E.2d 674 (1990) (reinstating murder conviction) [*Flowers II*]. In short, Marvin Flowers admitted that he killed his employer, Robert Murray, with a baseball bat, but maintained that the killing was either in self defense or constituted voluntary manslaughter rather than murder. The trial court determined that the evidence required jury instructions on both murder and voluntary manslaughter. R. 22-23; S.R. 1181-84. The instructions given to Flowers' jury, however, allowed the jury to convict Flowers of murder without regard to the presence or absence of those mitigating circumstances that distinguish voluntary manslaughter from murder, which has been held to violate the federal due process clause, *see Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), and Illinois law, *see People v. Reddick*, 123 Ill.2d 184, 526 N.E.2d 141 (1988).

Flowers' case demonstrates the jury confusion to which *Falconer* and its progeny is addressed: initially Flowers'

jury returned verdicts finding him guilty of *both* murder and voluntary manslaughter. S.R. 24. A judge, who had stepped in to receive the verdicts in the absence of the trial judge, ordered the jury to deliberate further, instructing them to return either the murder or the voluntary manslaughter verdict form, but not both. R. 24-27. The judge twice attempted to clarify the written instructions with little success (as we discuss *post*). Eventually, the jury returned a murder verdict and Flowers was sentenced to forty years for the offense of murder. R. 31-32. After exhausting his state remedies, Flowers petitioned for federal habeas relief. *See Flowers*, 767 F. Supp. at 884-85 (detailing Flowers' state court history).

II.

Flowers asserts that he is entitled to federal habeas relief because the written and supplemental oral jury instructions violated his due process rights under the Fourteenth Amendment. First, Flowers correctly asserts that his written jury instructions violate federal due process. *Taylor v. Gilmore*, 954 F.2d 441 (7th Cir. 1992); *United States ex rel. Fleming v. Huch*, 924 F.2d 679 (7th Cir. 1991); *Rose v. Lane*, 910 F.2d 400 (7th Cir. 1990); *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990). Illinois concedes this point, *see* Brief of Respondent-Appellee, Cross Appellant at 5-6, but argues that the judge's supplemental oral instructions cured any deficiency. After a thorough discussion of the judge's supplemental oral instructions, the district court concluded that the oral instructions "were not sufficient to cure the inherent confusion" in the written instructions. *Flowers*, 767 F. Supp. at 892. Our own view of the record reinforces the district court's conclusion: the judge's oral instructions further muddled an already confused jury through a series of misstatements and the use of undefined legal terminology such as "lesser included offense." R. 1078-81. Neither did the oral instructions correct the erroneous written instructions because the jury was not told that it could not convict Flowers of murder if it found that Flowers believed that he was

justified in killing Murray, even if this belief was unreasonable.

Illinois next argues that even if the jury instructions violate federal due process, Flowers is nevertheless not entitled to collateral relief. Illinois contends that granting Flowers relief on his due process claim would constitute retroactive application of a new rule of criminal procedure in violation of *Teague v. Lane*, 489 U.S. 288 (1989). The district court held that *Falconer* did not announce a "new rule" under *Teague* and that Flowers was accordingly entitled to its application. Our recent decision in *Taylor* makes clear that the district court was correct. *Taylor*, 954 F.2d at 453 (holding that "Falconer is not a new rule"). Flowers is entitled to the benefit of *Falconer*.

Finally, we consider Illinois' argument that the errors in Flowers' jury instructions were harmless beyond a reasonable doubt. *See Rose v. Clark*, 478 U.S. 570 (1986); *Chapman v. California*, 386 U.S. 18 (1967). Considering that the Flowers' [sic] jury initially returned verdicts for both murder and voluntary manslaughter, Illinois' argument here seems particularly barren—although we note that Illinois itself does not spend much time pursuing this point.[1] Moreover, we have rejected similar contentions in the past in this context, *see Fleming*, 924 F.2d at 683; *Rose*, 910 F.2d at 403; *Falconer*, 905 F.2d at 1137, particularly where a defendant stakes his entire defense on a mitigating mental state rather than innocence. *Taylor*, 954 F.2d at 454. Our review of the record confirms the state trial judge's apparent belief, given that he tendered a voluntary manslaughter instruction to the jury, that the evidence presented at trial could support either a volun-

[1] Flowers' motion to strike portions of Illinois' reply brief was carried with this case. We grant that motion only as to the portion seeking to strike Argument I from Illinois' reply brief as improper surrebuttal. We deny the remaining two counts of that motion (pertaining to arguments III and IV of Illinois' reply brief). We deem it unnecessary for Illinois to file a new brief with Argument I stricken.

tary manslaughter verdict or a murder verdict. Consequently, we conclude that the error at Flowers' trial was not harmless beyond a reasonable doubt; he is entitled to federal habeas relief on his due process claim.

III.

Flowers also seeks habeas corpus relief on the basis of an alleged violation of the Double Jeopardy Clause during his state proceedings. Flowers asserts that the jury's initial return of a voluntary manslaughter verdict constituted a murder acquittal because it reflected a finding, beyond a reasonable doubt, of the presence of those mitigating circumstances that reduce murder to voluntary manslaughter. The jury's simultaneous return of a murder verdict did not negate or contradict that finding, argues Flowers, because the faulty murder instruction did not require the jury to make a determination as to the presence or absence of the mitigating circumstances. Thus, Flowers insists, the Double Jeopardy Clause prohibits rejection of the jury's finding and resubmission of the murder issue to the jury.[2]

But Flowers was not expressly acquitted of murder; he cannot prevail unless the jury's alleged finding as to his mental state impliedly acquitted him of murder. *See Ohio v. Johnson*, 467 U.S. 493, 497-99 (1984) (citations omitted).

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[2] The district court declined to accept Flowers' double jeopardy argument, reasoning that it should defer to the Illinois Supreme Court's resolution of this issue in *Flowers II*, 561 N.E.2d at 678. *See Flowers*, 767 F. Supp. at 892. The Illinois Supreme Court determined that what Flowers' jury intended was speculative and that its initial verdicts were legally inconsistent so as to permit further deliberations, *see Flowers II*, 561 N.E.2d at 678, a determination that the district court characterized as one of "fact and procedure." *Flowers*, 767 F. Supp. at 892. We need not decide whether the district court properly characterized the Illinois Supreme Court's determination as a factual one entitled to deference, *see* 28 U.S.C. § 2254, because we agree with its conclusion even if it is one of law or a mixed question of fact and law.

Flowers cannot meet his burden of demonstrating an implied acquittal because the confusing and ambiguous jury instructions in this case make it impossible to know what the jury intended when it returned both verdicts. *See ante* at 3-5; *Falconer*, 905 F.2d at 1136. Although Flowers was being tried for both murder and voluntary manslaughter, the judge never explained to the jury that voluntary manslaughter is not a lesser included offense of murder and that Flowers could not be guilty of both crimes simultaneously.[3] The jury may have believed that a murder conviction required or included a voluntary manslaughter conviction as well. Had the judge made clear to the jury the relationship between murder and voluntary manslaughter, then the potential for jury confusion that drives *Falconer* and its progeny may not have been present in this case. *See Falconer*, 905 F.2d at 1136 (instructions are faulty precisely because the murder instruction "read[s] as though voluntary manslaughter did not exist as a crime" although both murder and manslaughter are at issue); *Taylor*, 954 F.2d at 450 (noting while discussing *Falconer* that the instructions "[w]hen read together [are] susceptible to more than one reasonable interpretation").

Accordingly, while it is theoretically *possible* that the jury wanted to acquit Flowers of murder but felt compelled not to by the faulty instructions, it is also possible that the jury found Flowers guilty of murder and believed that that finding compelled them to find him guilty of voluntary manslaughter as well. Flowers' petition gives us no reason to favor his speculation. Consequently, we hold that Flowers has not met his burden on federal ha-

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[3] Indeed, Flowers does not dispute that a court may reject legally inconsistent verdicts without running afoul of the Double Jeopardy Clause, *see Hoffer v. Morrow*, 797 F.2d 348, 352 (7th Cir. 1986); *Flowers*, 767 F. Supp. at 24 (and cases cited therein), or that these verdicts were inconsistent with the substantive law of Illinois. *See People v. Almo*, 90 Ill.Dec. 885, 889, 483 N.E.2d 203, 207 (Ill. 1985).

beas review of demonstrating that he has been denied his rights guaranteed by the Double Jeopardy Clause.

* * *

We AFFIRM the district court's grant of Flowers' petition for a writ of habeas corpus. The writ shall issue, thereby releasing Flowers from custody, unless the State of Illinois elects to retry him within ninety (90) days from the issuance of this Court's final mandate.

AFFIRMED

EASTERBROOK, *Circuit Judge*, concurring. We are at loggerheads with the Supreme Court of Illinois, which held in this very case (*People v. Flowers*, 138 Ill. 2d 218, 561 N.E.2d 674 (1990)), that *People v. Reddick*, 123 Ill.2d 184, 526 N.E.2d 141 (1988), would not be applied to persons whose convictions became final before its rendition on June 20, 1988. *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), and *Taylor v. Gilmore*, 954 F.2d 441 (7th Cir. 1992), create this conflict and support our decision today. Although I join the court's opinion (except for Part II), I write separately to explain why I would not have decided *Falconer* and *Taylor* in the same way. At oral argument counsel for Illinois informed us that these decisions undercut hundreds of convictions for murders that predate 1987 (when the state enacted a new murder statute), and that petitions for writs of habeas corpus seeking the benefit of these cases are being filed at the rate of two per week.

Most trial judges in Illinois use pattern jury instructions prepared by the Committee on Pattern Jury Instructions appointed by the Supreme Court of Illinois. The *Illinois Pattern Jury Instructions* §27.01 (2d ed. 1981), recommended that when the accused in a murder prosecution raises self-defense, the jury should be instructed as follows:

To sustain the charge of murder, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of [the victim]; and

Second: That when the defendant did so, he intended to kill or do great bodily harm to [the victim]; or he knew that his acts would cause death or great bodily harm to [the victim]; or he knew that his acts created a strong probability of death or great bodily harm to [the victim]; and

Third: That the defendant was not justified in using the force which he used.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

. . .

To sustain the charge of voluntary manslaughter, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of [the victim]; and

Second: That when the defendant did so, he intended to kill or do great bodily harm to [the victim]; or he knew that his acts would cause death or great bodily harm to [the victim]; or he knew that his acts created a strong probability of death or great bodily harm to [the victim]; and

Third: That when the defendant did so he believed that circumstances existed which would have justified killing [the victim]; and

Fourth: That the defendant's belief that such circumstances existed was unreasonable.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

Flowers' jury received a charge of this kind. (He was tried in 1980, but many judges used such instructions before the formula was enshrined in the pattern book.)

The first and second "propositions" of murder and manslaughter are identical. The third element of murder is similar to the fourth element of voluntary manslaughter. The third element of manslaughter is unique to that offense. Despite the overlap, these instructions do not include a rule of preference. They do not say, for example, that if the jury finds that the defendant had an actual, but unreasonable, belief in the need to apply deadly force, it should convict of voluntary manslaughter and stop.

Reddick considered whether this pair of instructions is appropriate. The court concluded that it is not. First, the court held, once the defendant satisfies a burden of production on the subject of justification, a conviction for murder is proper only if the prosecution shows beyond a reasonable doubt that the accused lacked a belief in the justification for his deeds. Second, the court deleted the belief in justification as an element of manslaughter, so that a person who has either no belief in justification, or an objectively unreasonable one, will be convicted of manslaughter if the prosecution fails to carry its burden on the murder charge. To obtain an acquittal on voluntary manslaughter, the defendant must carry the burden of showing an actual, and objectively reasonable, belief in justification. These adjustments ended the overlap between murder and voluntary manslaughter.

The court did not reach its conclusion in *Reddick* under compulsion of the statute. The law that governed between 1961 and 1987 defined murder this way: "A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death: (1) He either intends to kill or do great bodily harm to that individual or another . . .; or (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or (3) He is attempting or committing a forcible felony other than voluntary

manslaughter." Ill. Rev. Stat. ch. 38 ¶9-1(a). The pattern jury instructions track the statutory elements. *Reddick* added the fourth, negation-of-belief, requirement, and allocated the burdens of persuasion, to distinguish murder from voluntary manslaughter in self-defense cases.

Reddick reads like a statutory decision. It discusses state law and when specifying the burdens of persuasion says that "this issue is controlled by section 3-2 of the Criminal Code of 1961", 526 N.E.2d at 145. The court wraps up, *id.* at 146: "Thus, under the 1961 Code . . .". Our opinion in *Falconer* came two years later. We noted that Illinois interpreted its law so that an actual, but objectively unreasonable, belief in the need to use deadly force calls for a manslaughter rather than a murder conviction. Yet "[t]he murder instruction . . . read as though voluntary manslaughter did not exist as a crime. No matter how clearly either the State or the defense proved the existence of the mitigating 'manslaughter defenses,' the jury could nevertheless return a murder verdict in line with the murder instruction as given. Far from setting aside an interpretation of state law by state courts, the district court's decision [issuing a writ of habeas corpus] effectuated the holding of *Reddick* through the vehicle of the Due Process Clause." 905 F.2d at 1136. The constitutional problem, in other words, was that the pattern instruction did not represent the authentic state law. See also *Rose v. Lane*, 910 F.2d 400 (7th Cir. 1990); *Fleming v. Huch*, 924 F.2d 679 (7th Cir. 1991). The panel did not explain why 28 U.S.C. §2254, which surely does not allow a federal court to "set[ ] aside an interpretation of state law by state courts", does authorize it to "effectuate[ ]" an interpretation of state law by the state courts. The writ may issue only when the custody violates *federal* law (including the Constitution). E.g., *Estelle v. McGuire*, 112 S. Ct. 475, 479-80 (1991); *Lewis v. Jeffers*, 110 S. Ct. 3092, 3102 (1990); *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Smith v. Phillips*, 455 U.S. 209, 221 (1982); *Rose v. Hodges*, 423 U.S. 19, 21-22 (1975); *Brecht v. Abrahamson*, 944 F.2d 1363, 1366 (7th Cir. 1991); *Bates v. McCaughtry*, 934 F.2d

99, 102 (7th Cir. 1991); *Bell v. Duckworth*, 861 F.2d 169 (7th Cir. 1988); *Jones v. Thieret*, 846 F.2d 457, 459 (7th Cir. 1988). That a state court violated state law "is no part of a federal court's habeas review of a state conviction." *Estelle*, 112 S. Ct. at 480.

Next the Supreme Court of Illinois had to decide whether to apply *Reddick* retroactively. It accepted our view that *Reddick* must have been a constitutional decision (although it did not say why, any more than we had). Treating the decision as constitutional summoned up *Teague v. Lane*, 489 U.S. 288 (1989), which holds that new constitutional decisions do not apply retroactively on collateral review unless they place conduct beyond the power of the state to penalize or establish rules fundamental to a free society. *Reddick* did not do either of these things; rather it specified the dividing line between murder and voluntary manslaughter in Illinois. So the court had to decide whether *Reddick* created a new rule. It answered yes: "Though *Reddick* was doctrinally consistent with existing laws regarding affirmative defenses and burdens of proof, it was the first time this court applied these legal principles to the specific situation of the murder and voluntary manslaughter instructions. . . . [L]ong-standing practice in the trial courts was to instruct the jury on murder and voluntary manslaughter consistent with the Illinois Pattern Jury Instructions. This court also did not invalidate these instructions in other cases it reviewed prior to *Reddick*." 561 N.E.2d at 683.

Two turns for Illinois, and then a second turn for this court when *Taylor* considered the retroactive application of *Reddick*. The first step in applying *Teague* is to characterize the rule. This produced something of an embarrassment, for characterizing the rule as "effectuat[ing] the holding of *Reddick* through the vehicle of the Due Process Clause" shows that we do not have a constitutional rule at all. *Taylor* therefore abandoned the rationale of *Falconer* and substituted a new one: the defendant is entitled to be free of instructions so vague and confusing that the jury cannot make a rational decision. 954 F.2d

at 448-50. That is an old rule, long predating *Reddick*. So, we concluded, the parties had been mistaken in asking us to decide whether *Reddick* applied retroactively. *Id.* at 450. The only question was whether the instructions satisfied the established requirement of clarity. Concluding that they did not, we directed the district court to issue a writ of habeas corpus.

Taylor avoids confounding a violation of state law with a violation of the Constitution. But in rescuing *Falconer* from a charge of usurpation of power, we turned that case and *Reddick* on their heads. For their objection to the pattern instructions was not their vagueness but their clarity. These instructions tell the jury that a person who slays another, having an objectively unreasonable belief in justification, is guilty of both murder and voluntary manslaughter. If however the defendant lacks any belief in the justification of his acts, the jury is to convict of murder but not voluntary manslaughter (for the instructions say that such a belief is an element of manslaughter but not of murder). The instructions tell a jury precisely what to do. According to *Reddick*, they tell the jury the *wrong* thing to do, for Illinois wants a rule in which an actual, but unreasonable, belief in justification reduces the crime to voluntary manslaughter. It was the substance of the instructions, and not any lack of clarity, that underlay both *Reddick* and *Falconer*. Flowers' jury did just as instructed if it found that he had an actual, but objectively unreasonable, belief in justification: first it returned guilty verdicts on both offenses, and then when told to choose one it picked the more serious. Where is the confusion?

The perspective I have offered—that the pattern instruction is clear but unfortunate—follows scholarly commentary on these instructions. See James B. Haddad, *Allocation of Burdens in Murder-Voluntary Manslaughter Cases: An Affirmative Defense Approach*, 59 Chi.-Kent L. Rev. 23 (1982); Haddad, *Second Degree Murder Replaces Voluntary Manslaughter in Illinois: Problems Solved, Problems Created*, 19 Loyola U. L.J. 995 (1988); Timothy P. O'Neill,

"With Malice Toward None": A Solution to an Illinois Homicide Quandary, 32 DePaul L. Rev. 107 (1982). Professor Haddad, who represents Flowers, implored the Supreme Court of Illinois to deal with the problem by requiring the prosecutor to prove the absence of a belief in justification in order to obtain a conviction for murder, while making justification an affirmative defense to manslaughter charges. This is what the Court did. And Professor Haddad's principal argument to us is that Flowers' murder conviction violates the double jeopardy clause *precisely because the instructions are clear.* A jury that finds the accused guilty of both murder and voluntary manslaughter *must* have concluded that he possessed an actual, but unreasonable, belief in justification. *Reddick* then calls for judgment on the manslaughter verdict rather than the murder verdict. This is a solid argument—although I think under state law rather than the double jeopardy clause—but it is inconsistent with the rationale *Taylor* constructs for applying *Falconer* retroactively.

One can of course treat any substantive error as scrambled communication. The communicative failure is that the instructions did not convey the correct substance. They were confusing not by an internal benchmark, but by reference to the authentic state law established in *Reddick*. Repackaging the substantive argument in this way adds nothing, however. Every substantive defect may be thus recast, with the result that every error of state law in a jury instruction violates the Constitution as well—an outcome that §2254 does not tolerate.

Falconer and *Taylor* jointly show the ease with which an error of state law becomes a violation of the Constitution. They show as well the allure of the process. Convicting a man of murder, when his real crime is manslaughter, does not sit easily. Judges strain to provide redress. Holding the line between state and federal problems is difficult given the reluctance of every judge to see a person convicted of the wrong crime. Cases provide many models for transmuting errors of state law into violations of the Constitution. *Falconer* and *Taylor* il-

lustrate two of the methods. There are many others. The Constitution requires the prosecution to prove its case beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). If the state court does not frame the instructions accurately under state law, how can the jury have found every element beyond a reasonable doubt? See *Cole v. Young*, 817 F.2d 412 (7th Cir. 1987); but see *id.* at 435-40 (dissenting opinion). *Winship* implies that the state must bring forth evidence from which a sane factfinder could conclude, beyond a reasonable doubt, that the accused committed the offense. *Jackson v. Virginia*, 443 U.S. 307 (1979). Does it not then follow that any important error violates the Constitution? If the trial judge misunderstands state law, how can the jury have made the necessary findings? See *Fagan v. Washington*, 942 F.2d 1155 (7th Cir. 1991); but see *Bates v. McCaughtry*, 934 F.2d 99 (7th Cir. 1991). All of these methods come to the same thing: disparity between the "real" state law and the rules applied in a particular case violates the Constitution. Yet if these and cognate methods are indeed appropriate, then the many cases telling federal courts to distinguish between violations of state and federal law are nothing but hot air. The distinction is vital but trivial, governing only when, as in *Estelle v. McGuire*, the judge is so careless as to *say* that the writ must issue to redress an error of state law.

Section 2254 calls on courts to distinguish state from federal law, and it must suppose that distinction is possible. Federal courts promote justice by ensuring that states respect constitutional rules to which they may be hostile; there is no comparable role in helping states to enforce those rules they have adopted on their own. Courts have come to recognize that an extended review, through a cascade of courts, carries high costs, and that it is better to tolerate the occasional error than to pursue the impossible dream of correcting them all. E.g., *Coleman v. Thompson*, 111 S. Ct. 2546, 2565 (1991); *McCleskey v. Zant*, 111 S. Ct. 1454 (1991). Pursuing that mirage entails great costs. See generally Paul M. Bator, *Finality*

in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963). Our case illustrates these costs, some obvious and some subtle. The obvious costs stem from delay and multiple litigation. We order new trials for a large class of litigants who did not object to the instructions at trial or on direct appeal. Many of these trials will be less accurate, given the passage of time, than were the original ones with defective instructions. Sometimes retrial will be impossible.

The subtle costs are also more insidious. The Supreme Court of Illinois decided to improve the mesh between murder and manslaughter, thinking that prospective application meant bearable costs. We reply, in effect, that whenever a state court holds that a jury instruction misstates the elements of an offense or the burden of persuasion, it must afford new trials to everyone affected by the old instruction. Judges of a state's highest court must now think thrice before they find a flaw in a pattern jury instruction! From now on, prudence lies in perpetuating dubious instructions rather than improving them. I doubt that defendants gain when federal judges impel their state cousins to pusillanimous passivity.

Available tools are too numerous, and the urge to use them too strong, for judges at our level to bring order. Still, I offer a suggestion: why not distinguish state from federal law by *ignoring* state law? Assume, for example, that the instructions given the jury are accurate and ask: Does the Constitution prevent a state from convicting a person on such instructions? Cases such as *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), illustrate situations in which the answer is yes. But if a state could choose to do something—choose, for example, to make self-defense an affirmative defense to murder, see *Patterson v. New York*, 432 U.S. 197 (1977); *Martin v. Ohio*, 480 U.S. 228 (1987)—then the federal inquiry is over; whether the state has indeed so chosen is a question of its domestic law. To put this differently, we should assume that the judgment under examination was rendered by the state's highest court, which

declared: "Yes, these events are exactly what our law requires." Here we should assume that *Reddick* came out the other way, that the Supreme Court of Illinois ordered trial judges to keep using the pattern jury instructions. Would there then be a constitutional flaw?

Start with murder, for that is the crime of which Flowers was convicted. The instructions told the jury to convict Flowers of murder if it found that the prosecution had established beyond a reasonable doubt (1) that Flowers killed Murray with the baseball bat, (2) that Flowers intended to slay Murray or do him serious harm, and (3) that Flowers lacked justification for this use of deadly force. This is a standard definition, in use before the United States became a nation. It required the prosecution to show more than the constitutional minimum. (Element 3 could be an affirmative defense.) Now add the voluntary manslaughter instruction. This does not alter any of these elements or relieve the state of its burden. Quite the contrary, the voluntary manslaughter instruction tracked the elements of murder and added a fourth. Overlapping elements are common. Even identical crimes carrying different penalties do not create constitutional problems. *United States v. Batchelder*, 442 U.S. 114 (1979). Does the Constitution forbid charging the jury on overlapping or even identical offenses? Surely not. But that is all that happened to Flowers, if we delete all state-law issues by assuming that *Reddick* came out the other way.

Natural law does not compel states to make "manslaughter" a lesser included offense of "murder," rather than the other way around. Lexicographers' preference for the ranking of "murder" and "manslaughter" is not binding on the states in the name of the Constitution, which allows words no talismanic quality. Flowers received a trial at which the jury found him guilty of elements constituting murder and received a sentence (40 years' imprisonment) that may be meted out to one who commits such acts. Perhaps in light of *Reddick* the Governor of Illinois should commute this conviction to manslaughter; such questions are for the officials charged with deciding issues

of state law, as we are not. *If* Illinois wishes to use these instructions, it may; *whether* it wishes to do so is none of our business.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: May 7, 1992

BEFORE:

Honorable Richard A. Posner, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Jesse E. Eschbach, Senior Circuit Judge

Nos. 91-2330 and 91-2415

MARVIN FLOWERS,

Petitioner-Appellant, Cross-Appellee,

v.

ILLINOIS DEPARTMENT OF CORRECTIONS,

Respondent-Appellee, Cross-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 90 C 6505, Judge William T. Hart

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court granting Flowers' petition for a writ of habeas corpus is AFFIRMED, the writ shall issue, thereby releasing Flowers from custody, unless the State of Illinois elects to retry him within ninety (90) days from the issuance of this court's final mandate, in accordance with the decision of this court entered this date.

APPENDIX B

138 Ill. 2d 218

561 N.E.2d 674

The PEOPLE of the State of Illinois, Appellant,

v.

Marvin FLOWERS, Appellee.

No. 69777.

Supreme Court of Illinois.

Sept. 26, 1990.

* * * * *

Justice RYAN delivered the opinion of the court:

Following a jury trial in the circuit court of Cook County, defendant, Marvin Flowers, was convicted of murder, armed robbery and armed violence, and sentenced to concurrent prison terms of 40 years for murder and 15 years for armed robbery. The appellate court affirmed the convictions in an unpublished Rule 23 order (107 Ill.2d R. 23). (109 Ill.App.3d 1211.) Defendant then filed a petition under the Post-Conviction Hearing Act (Ill.Rev.Stat. 1987, ch. 38, par. 122-1 *et seq.*) and, without an evidentiary hearing, the circuit court granted the State's motion to dismiss the petition. The appellate court, however, applied *People v. Reddick* (1988), 123 Ill.2d 184, 122 Ill.Dec. 1, 526 N.E.2d 141, retroactively and held that the instructions given to the jury on the offenses of murder and voluntary manslaughter were erroneous. (192 Ill.App.3d 292, 139 Ill.Dec. 381, 548 N.E.2d 766.) Therefore, the court reversed the murder conviction and remanded for a new trial. We granted the State's petition for leave to appeal (107 Ill.2d R. 315(a)) to address, *inter alia*, the retroactivity of *People v. Reddick* to a case on collateral review. We reverse the appellate court.

The facts in this case are essentially undisputed. Robert Murray was found in his store dead as a result of several blows to his head from a baseball bat. At the time of the murder, defendant was working for Murray and evidence at the store made him a suspect. Near defendant's apartment police officers found Murray's car and in it were a baseball bat, a revolver, a coin bank and two power saws, all of which had been taken from the store. Defendant already was in custody in connection with another incident that had occurred earlier that day. When questioned about the murder, defendant first told police that he was in the store when two men killed Murray and that the two men forced him to put the items in the car and to put his fingerprints on the gun and bat. The men also told defendant that they would kill him and his girlfriend if he did not help them. Defendant claims to have taken the car under duress. After an officer told him of the unlikelihood of his alibi, defendant changed his story. Defendant stated instead that he and Murray had an argument about money that was allegedly owed to defendant. He claimed that Murray attacked him, initiating a fight. Murray then reached for a gun and defendant grabbed a nearby baseball bat and struck him several times in the head. Realizing that he would not get the money owed him, defendant took cash and property from the store, placed the items into Murray's car and drove back to his apartment, leaving his own car parked in front of the store.

At trial, defendant presented no evidence although counsel argued that defendant had acted under the unreasonable belief that facts existed which justified his conduct and was thus only guilty of voluntary manslaughter. The jury was given pattern jury instructions on the offenses of murder and voluntary manslaughter. (Illinois Pattern Jury Instructions, Criminal, Nos. 7.02, 7.06 (2d ed. 1981).)

The murder instruction stated that the State must prove that:

> (1) defendant performed the acts which caused the death of Robert Murray;
>
> (2) when defendant did so, he intended to kill or do great bodily harm to Robert Murray; or he knew that his act would cause death or great bodily harm to Robert Murray; or he knew that his acts created a strong probability of death or great bodily harm to Robert Murray; and
>
> (3) defendant was not justified in using the force which he used.

This instruction did not include the so-called "fourth proposition," that the State must prove that the defendant did not believe circumstances existed which justified the use of the force that he used. The voluntary manslaughter instruction required the State to prove that:

> (1) defendant intentionally or knowingly performed the acts which caused the death of Robert Murray;
>
> (2) when defendant did so he believed that circumstances existed which would have justified killing Robert Murray;
>
> (3) defendant's belief that such circumstances existed was unreasonable; and
>
> (4) defendant was not justified using the force which he used.

After deliberations, the jury signed verdict forms finding defendant guilty of both murder and voluntary manslaughter. The trial judge informed the jurors that they could not return both verdicts; it had to be one or the other. The jury resumed deliberations but later sought further instructions. The judge then explained that voluntary manslaughter was a lesser included offense of murder, and that he would not accept a verdict on both

charges. He informed the jurors that they should identify which of the verdict forms actually reflected their determination of guilt and then cross out the other guilty verdict form. After further deliberations, the jury returned with the murder verdict intact and the voluntary manslaughter verdict crossed out. Defendant was sentenced to concurrent terms of 40 years for murder and 15 years for armed robbery. No sentence was imposed on the armed violence count.

On appeal from his conviction, in a Rule 23 order, the appellate court held that the trial court did not err when it required the jury to continue deliberations and determine whether defendant was guilty of murder or voluntary manslaughter. Also, the court held adversely to the defendant on his contention that the trial judge's oral instructions to the jurors constituted reversible error. Defendant did not prevail on his contention that he was not properly proven guilty of armed robbery, felony murder and murder. Last, defendant's challenge to his arrest was unsuccessful.

Defendant subsequently filed a petition pursuant to the Post-Conviction Hearing Act (Ill.Rev.Stat. 1987, ch. 38, par. 122-1 *et seq.*), which the trial court dismissed without an evidentiary hearing. As noted, the appellate court reversed. The court applied *People v. Reddick* retroactively and held that the instructions in defendant's case erroneously stated the law and required that defendant be given a new trial. In a petition for rehearing the State argued that any error as to the murder and voluntary manslaughter instructions was rendered harmless because of the felony-murder count of the indictment. The court rejected this contention because the State had not submitted a felony-murder verdict form and the evidence was not so overwhelming that the jury could not have found

anything but that the victim's death was caused during the course of the armed robbery. We granted the State's petition for leave to appeal (107 Ill.2d R. 315). Defendant in his response brief also argued for cross-relief, and the State has filed a reply to the arguments raised (107 Ill.2d R. 315(g)). We granted leave to file an *amicus curiae* brief to the public defender of Cook County (107 Ill.2d R. 345(a)).

The first argument we address is defendant's contention that the trial court violated double jeopardy protections when it ordered further deliberations instead of accepting the jury's verdict of voluntary manslaughter. Defendant contends that the initial verdicts finding him guilty of voluntary manslaughter and murder were consistent with the jury instructions. Therefore, the jury found the presence of the statutory mitigating circumstances which distinguish voluntary manslaughter from murder and it impliedly acquitted defendant of murder. He argues that unless the verdicts are hopelessly inconsistent with the instructions the double jeopardy clauses of the State and Federal Constitutions prohibit a court from rejecting those verdicts and in this case the court should have entered the verdict of voluntary manslaughter. The State contends that the appellate court on direct review rejected defendant's argument that the trial judge should have entered the voluntary manslaughter verdict and not the murder verdict. Therefore, he is barred by the principle of *res judicata* from raising again this issue as a double jeopardy claim. Regardless, the State contends that in *People v. Almo* (1985), 108 Ill.2d 54, 90 Ill.Dec. 885, 483 N.E.2d 203, this court approved of the trial court's decision to require the jury to deliberate further.

Ordinarily *res judicata* and waiver bar consideration of an issue which was raised or could have been raised on

direct review (*People v. Gaines* (1984), 105 Ill.2d 79, 87-88, 85 Ill.Dec. 269, 473 N.E.2d 868), but under certain circumstances, fundamental fairness dictates that we consider the issue (*People v. Hamby* (1968), 39 Ill.2d 290, 291, 235 N.E.2d 572). Defendant argues that *Almo*, which was issued after his direct review, was improperly decided and that in that case no issue of double jeopardy was raised. He contends that if the constitutional doctrine applies in this situation a reversal of his conviction is mandated. Although we ultimately do not accept defendant's argument, we believe that this issue should be addressed.

People v. Almo is nearly indistinguishable. In *Almo* the jury was given the same instruction for murder as in this case. This instruction also did not include the fourth proposition, that the State must prove the defendant did not believe circumstances existed which justified the use of the force that he used. The *Almo* jury initially asked if it must find the defendant guilty of all three charges or whether two guilty verdicts were sufficient. The judge sent it a note explaining the possible verdicts which it could return. The jury's initial verdict forms, however, found defendant guilty of murder, voluntary manslaughter and armed violence. The judge reinstructed the jury that it must find the defendant guilty either of murder or voluntary manslaughter but not both. It then returned a murder verdict. On review, we noted that when the trial judge received the initial verdict forms he could not enter judgment on one and vacate the other. The judge "had no way of knowing which of the two verdicts was intended by the jury and which was a result of some misconception." (*Almo*, 108 Ill.2d at 63-64, 235 N.E.2d 572.) We stated further:

> "In this case, it was clear that the jury had misunderstood the trial judge's written answer to the

> jury's question. By its two verdicts the jury indicated its belief that it was legally possible to convict the defendant simultaneously of murder and voluntary manslaughter based upon the same acts. The obvious way to correct this misapprehension was for the trial judge to do precisely what he did, *i.e.*, change the instruction to read that an individual convicted of one crime 'must' not also be convicted of the other. We find the court's action in this case to be both sensible and practical and clearly not an error." 108 Ill.2d at 64, 235 N.E.2d 572.

Likewise, in this case, the jury exhibited confusion regarding what verdicts it must return. The trial judge could not enter the two verdicts, and he explained to the jury that it could not return guilty verdicts on both counts. (See *People v. Hoffer* (1985), 106 Ill.2d 186, 88 Ill. Dec. 20, 478 N.E.2d 335 (case reversed after judge entered the jury verdicts of guilty of murder, voluntary manslaughter and involuntary manslaughter).) The judge told the jury to continue deliberations and return the verdict which it believed most appropriately encompassed defendant's acts. The jury then returned the murder conviction.

Defendant argues that the jury was not confused, rather it intended to convict defendant of voluntary manslaughter only and that, because the initial verdict forms returned were consistent with the instructions, double jeopardy protection was violated. First, we do not agree that the jury exhibited any such intent. (See *Hoffer*, 106 Ill.2d at 198, 88 Ill.Dec. 20, 478 N.E.2d 335 (rejecting argument that the jury impliedly acquitted defendant of murder after it returned multiple verdicts).) The jurors were confused, but the judge rectified the problem with his statements regarding their duty, the meaning of the verdict instructions, and the possible verdicts, and with his admonition

to cross out the form they did not want and to enter the one best fitting the circumstances. As the court stated in *Almo*, "[a]lthough the jury may have initially been confused, the trial judge's additional instruction alleviated the problem before any verdicts were entered." (*Almo*, 108 Ill.2d at 65, 235 N.E.2d 572.) Second, the verdicts were legally inconsistent and, therefore, the judge could not enter them both. (See *Hoffer*, 106 Ill.2d at 194-96, 88 Ill. Dec. 20, 478 N.E.2d 335 (the mental states involved in the two offenses were mutually inconsistent and a jury could not find that both existed in the same case).) Defendant points out that the instructions in this case failed to include the fourth proposition, unlike the instructions in *Hoffer*, and therefore the two instructions were not inconsistent. However, the trial judge understood that the two convictions could not be entered and explained to the jury that they were incompatible. This admonition compensated for any error in failing to instruct on the fourth proposition. Additionally, as pointed out in *Almo* it is speculative that the fourth proposition would have prevented the jury from reaching its initial verdict. *Almo*, 108 Ill.2d at 65, 235 N.E.2d 572 (noting that the jury in *Hoffer* received the fourth-proposition instruction and still returned a guilty verdict on both murder and voluntary manslaughter).

We find that double jeopardy rights were not violated. "The constitutional prohibition of double jeopardy protects a defendant from prosecution of an offense after acquittal or conviction of the same offense and prohibits multiple punishments for the same offense." (*Hoffer*, 106 Ill.2d at 197, 88 Ill.Dec. 20, 478 N.E.2d 335.) We have held that the judge acted properly in returning the initial verdict forms to the jury. As a result, there was only one verdict entered in this case and therefore the constitutional principle urged is not implicated. (See *Almo*, 108 Ill.2d

at 63, 235 N.E.2d 572 (" 'The finding of a jury does not become a verdict until it has been received, accepted by the court and entered of record' "), quoting *People v. Wilson* (1972), 51 Ill.2d 302, 309, 281 N.E.2d 626.) Defendant, however, cites four appellate court opinions which allegedly support his contention that the trial judge should have entered the voluntary manslaughter verdict. (See *People v. Washington* (1984), 127 Ill.App.3d 365, 82 Ill. Dec. 505, 468 N.E.2d 1285; *People v. Kendricks* (1984), 121 Ill.App.3d 442, 77 Ill.Dec. 41, 459 N.E.2d 1137; *People v. Fox* (1982), 111 Ill.App.3d 243, 67 Ill.Dec. 55, 443 N.E.2d 1179; *People v. Stuller* (1979), 71 Ill.App.3d 118, 27 Ill.Dec. 529, 389 N.E.2d 593.) We distinguished *Stuller* in *Almo* on the grounds that in *Stuller* the trial judge entered one of the two verdicts returned and vacated the other verdict. The same factual distinction exists in the other cases. In this case and in *Almo*, however, the jury was allowed to resume deliberations after further instructions were given and thus it was allowed to clarify its intent rather than having a judge invade its province. Therefore, we do not find those cases persuasive.

Defendant next argues that his right to due process and right to a trial by jury were violated by the "inherently contradictory" instructions given at his trial. He claims that the written murder and voluntary manslaughter instructions required the jury to return verdicts for both murder and voluntary manslaughter if it found him guilty of voluntary manslaughter. Nevertheless, the judge told the jury that it could not return guilty verdicts for both offenses, and he provided no explanation for reconciling the contradiction. Defendant argues that together these instructions created an irreconcilable conflict on the voluntary manslaughter issue. The State argues that the ruling on this issue on direct appeal is *res judicata* and that

the trial judge's statements properly instructed the jury and that these statements were similar to those sanctioned in *Almo*.

Preliminarily, we note that defendant did not object to this instruction at trial and therefore this argument normally would be waived. Pursuant to Supreme Court Rule 451(c) (107 Ill.2d R. 451(c)), if an instruction is substantially defective and the interests of justice require, the objection is not considered waived. In cases subsequent to defendant's trial we recognized flaws in the murder and voluntary manslaughter instructions, and we do not believe that in this instance the failure to object should preclude our addressing the issue. Also, the appellate court did not address the due process issue and we do not believe that the principle of *res judicata* should preclude our consideration of this constitutional issue.

Defendant finds the conflict in his case to exist between the required result of the two written instructions, *i.e.*, guilty verdicts on both counts, and the oral instructions, *i.e.*, not guilty on at least one count. However, the cases he cites involved two written instructions on a single element or offense which were inconsistent and contradictory. (See *People v. Jenkins* (1977), 69 Ill.2d 61, 12 Ill. Dec. 728, 370 N.E.2d 532 (two instructions on an essential element of the crime charged were in direct conflict and one was erroneous); *Thomas v. Leeke* (4th Cir. 1984), 725 F.2d 246 (unequivocally contradictory instructions on the burden of proof for self-defense); *Harless v. Anderson* (6th Cir. 1981), 664 F.2d 610 (garbled and confusing instructions on an element of the offense), *rev'd on other grounds* (1982), 459 U.S. 4, 103 S.Ct. 276, 74 L.Ed.2d 3; see also *People v. Miller* (1949), 403 Ill. 561, 87 N.E.2d 649 (erroneous and contradictory instructions on self-defense).) Therefore, in these cases the jury was unable to

perform its constitutional function. However, the two written instructions for murder and voluntary manslaughter in this case are not in direct conflict and each involves a different mental state. The failure to include the fourth proposition in the murder instruction may have misled the jurors to believe that they had to return guilty verdicts on each charge. We have held, though, that if the language of an instruction is inaccurate, and, standing alone, may mislead the jury, other instructions may explain the inaccuracy, remove the error or render it harmless. (*Miller*, 403 Ill. at 565, 87 N.E.2d 649, quoting *Enright v. People* (1895), 155 Ill. 32, 36, 39 N.E. 561; see also *Almo*, 108 Ill.2d at 65, 235 N.E.2d 572.) The trial judge in defendant's case attempted to explain the jury's necessary outcome in light of the written instructions. He explained that the jurors' role required a verdict and that verdict could not be guilty as to both counts. Although the jurors may have been confused by the written instructions, they were properly told that they could only enter one verdict and they should choose the one best fitting the facts. The judge also explained, albeit not in the clearest manner that voluntary manslaughter was a lesser included offense of murder. In *Almo*, the court held that the verbal instructions sufficiently alleviated the confusion, and in this instance we believe whatever confusion may have occurred from these written instructions did not rise to a due process violation, in view of the way in which the situation was handled by the trial judge.

The next issue concerns the retroactivity of *People v. Reddick* (1988), 123 Ill.2d 184, 122 Ill.Dec. 1, 526 N.E.2d 141, in a post-conviction appeal. First, however, the State claims that we should not address this issue. The State contends that defendant requested the voluntary manslaughter instruction at trial; he did not complain about

the wording of the jury instructions in his motion for a new trial; on direct review defendant made no claim that the jury instruction failed to allocate the burden of proof properly; and the post-conviction petition did not raise the issue decided in *Reddick*. Therefore, the issue has been waived and the principle of *res judicata* should prevent consideration of it. Defendant responds that the State waived any objection to the retroactive application of *Reddick* because it failed to present any such argument to the appellate court after defendant filed a supplemental brief in that court which cited the *Reddick* opinion.

Defendant's position is untenable. The State did not have a duty to object to his motion for leave to file a memorandum of law which was based on the newly decided *Reddick* opinion and was filed after the briefs had been submitted to the appellate court. After the appellate court reversed defendant's conviction based on our holding in *Reddick*, the State was entitled to contest on appeal the rationale on which the appellate court relied. We also believe that in this instance the principles of waiver and *res judicata* should not prevent analysis of whether *Reddick* applies. Part of the effect of the error here and in *Reddick* is that the instructions confused the jury. Defendant has at each level of this case complained about the instructions and the confusion they caused, although he did not argue that there was an impermissible burden-shifting. Likewise, one of the defendants in *Reddick* also did not raise the issue at trial, in a post-trial motion or in the direct appeal; nevertheless, this court held that the error was grave and waiver should not preclude the rule from applying to him. There is an important principle involved and the failure of defendant to raise the issue prior to the court's resolution of it in *Reddick* should not bar consideration of it now.

The State next argues that the holding in *Reddick* that the State should have the burden of proof to disprove a voluntary manslaughter "defense" in order to obtain a murder conviction was based on statutory interpretation. The State contends that constitutionally the burden of proof as to voluntary manslaughter in a case involving murder and voluntary manslaughter instructions may be placed on either party. (See *Patterson v. New York* (1977), 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (requiring the defendant to bear the burden of proof for manslaughter does not violate due process); *Engle v. Isaac* (1982), 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783.) The Post-Conviction Hearing Act, however, may only be used to redress the denial of a constitutional right. (Ill.Rev.Stat. 1987, ch. 38, par. 122-1; *People v. Shaw* (1971), 49 Ill.2d 309, 311, 273 N.E.2d 816.) According to the State, therefore, the violation at defendant's trial of the principle announced in *Reddick* may not be raised in a post-conviction action.

We believe that the jury instructions used in this case sufficiently raised a constitutional issue for us to address the retroactivity of *Reddick* in a post-conviction case. In *Reddick* this court held that the State does not have the burden to raise the two mitigating mental states required in a voluntary manslaughter conviction but that it had the burden to disprove those mental states beyond a reasonable doubt if they are properly raised by the defense and the State seeks to convict defendant of murder. This determination of who has the burden was reached after a statutory construction analysis. The *Reddick* court, though, also addressed the jury instructions. These were found erroneous in that they failed to appropriately state the burdens of proof and that they were misleading and confusing. The court noted that the voluntary manslaughter

instruction appeared to place the initial burden to raise the mitigating mental states on the State and that the murder instruction failed to apprise the jury on the mitigating conditions. Therefore, in *Reddick* this court stated that the two instructions, viewed alone, essentially assured that, if the jury followed them, it could not convict a defendant of voluntary manslaughter. (*Reddick*, 123 Ill.2d at 194-95, 122 Ill.Dec. 1, 526 N.E.2d 141.) The court later characterized the error in the instructions as "grave."

First, we note that these instructions did not assure only a verdict of murder would be returned. The State points out that other verdicts have been reached in similar cases. Second, much emphasis appears to be placed on the court's characterization of the error as "grave." A grave error, though, is not necessarily a constitutional error; it may just signify that the error should not be considered waived if the defendant failed to object to it. The instructions in this case, however, standing alone, do potentially violate the constitutional right to have the jury adequately apprised of the appropriate law. (*People v. Jenkins* (1977), 69 Ill.2d 61, 66-67, 12 Ill.Dec. 728, 370 N.E.2d 532 (erroneous instructions may prohibit the jury from performing its constitutional function); see also *Falconer v. Lane* (7th Cir. 1990), 905 F.2d 1129, 1134 (a Federal *habeas corpus* action in which the court held that *Reddick* "obviously considered the errors resulting from the invalid instructions to be of constitutional magnitude").) The court stated in *Reddick* "that certain instructions, such as the burden of proof and elements of the offense, are essential to a fair trial and that the failure to give such instructions constitutes grave error when, viewing the record as a whole, it appears that the jury was not apprised of the People's burden of proof." (*Reddick*, 123 Ill.2d at 198, 122 Ill.Dec. 1, 526 N.E.2d 141; see also *Mar-*

tin v. Ohio (1987), 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed. 2d 267 (instructions misstated the burden of proving self-defense; however, other instructions sufficiently stated the burdens of proof so as not to confuse the jury).) As noted, in our case part of the error was mitigated by the instructions the trial judge gave; nevertheless, the error is of a constitutional dimension and the issue may be addressed in a post-conviction proceeding.

The main issue before us, therefore, is whether the *Reddick* decision will retroactively apply to a post-conviction proceeding. The United States Supreme Court in *Teague v. Lane* (1989), 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334, held that decisions establishing new constitutional rules of criminal procedure are not to be applied retroactively to cases pending on collateral review unless the new rule either (1) places certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe, or (2) requires the observance of those procedures that are implicit in the concept of ordered liberty. (*Teague*, 489 U.S. at 307, 109 S.Ct. at 1073, 103 L.Ed.2d at 353.) Defendant and *amicus* point out that the rule adopted in *Teague* was applied to bar application of a new constitutional rule in *habeas corpus* actions pending in the Federal courts and that the collateral review we are addressing involves an action in State court brought pursuant to our Post-Conviction Hearing Act. They argue that these two collateral reviews are distinguishable and that we should not adopt *Teague*'s standard and holding.

We, believe, however, that the *Teague* rule should be applied in this case. The *Teague* test is helpful and concise and in it we have the pronouncement of the Supreme Court on an issue nearly identical to the one before us. (See also *Brewer v. State* (Iowa 1989), 444 N.W.2d 77

(adopting the *Teague* test); *State v. Lark* (1989), 117 N.J. 331, 567 A.2d 197 (discussing *Teague* and noting that, although the analogy between Federal *habeas* proceedings and State post-conviction relief proceedings was imperfect, they were sufficiently similar to support the court's conclusion of nonretroactive application of a new constitutional rule).) Even prior to *Teague*, when determining whether a case dealing with a constitutional right should receive retroactive application under our Post-Conviction Hearing Act, we have ruled in accord with the Supreme Court's determination of whether to give the case retroactive application in a Federal *habeas* proceeding. In *People v. James* (1986), 111 Ill.2d 283, 95 Ill.Dec. 486, 489 N.E.2d 1350, we held that *Edwards v. Arizona* (1981), 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, which dealt with the right to counsel during questioning in criminal cases, should not receive retroactive application in a post-conviction proceeding. This decision was reached after observing that the Supreme Court had denied application of *Edwards* in a collateral attack pursuant to the Federal *habeas corpus* act. See *Solem v. Stumes* (1984), 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579.

Moreover, although the analogy is not perfect, the collateral proceeding involved in this case is similar to that involved in *Teague*. A *habeas corpus* proceeding and an action to our Post-Conviction Hearing Act are both collateral attacks that are not meant to be a substitute for direct review. Their primary goal is to ensure that defendants are not denied constitutional protections. (Ill.Rev. Stat. 1987, ch. 38, par. 122-1 (corrects the substantial denial of constitutional rights); *Teague*, 489 U.S. at 307, 109 S.Ct. at 1073, 103 L.Ed.2d at 353 (writs are not intended to ensure a trial free of constitutional error, but they serve as an incentive to courts throughout the country to con-

duct their proceedings consistent with constitutional principles prevailing at the time the proceedings take place).) The scope of a *habeas* proceeding is also defined by interests of comity and finality. The *Teague* Court stated:

> "[U]nderlying considerations of finality find significant and compelling parallels in the criminal context. Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." (489 U.S. at 309, 109 S.Ct. at 1074, 103 L.Ed.2d at 355.)

Certainly, Illinois has an interest in finality of its criminal trials, so long as the defendant was accorded a trial consistent with constitutional principles. In fact, our post-conviction statute provides a 10-year window during which the action may be brought. Although our statute is unclear, we do not believe that a constitutional principle established after the trial necessarily must be retroactively applied.

Application of the *Teague* rule indicates that *Reddick* should not be applied retroactively. In general, according to *Teague*, a new rule should not apply retroactively to cases on collateral review. The defendant, however, contends that no new rule was established in *Reddick*. He argues that the holding in *Reddick* was reached after reviewing the affirmative defense provision of the Criminal Code of 1961 and its predecessor in the Criminal Code of 1874. From this review, the court determined that the defendant had the burden to initially raise the mitigating mental states and then the State had the burden to disprove their existence by proof beyond a reasonable doubt. Therefore, he concludes that *Reddick* did not establish a new rule but merely interpreted existing laws.

In discussing the meaning of a new rule, the Court in *Teague* stated that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. [Citations.] To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." (Emphasis in original.) (*Teague*, 489 U.S. at 301, 109 S.Ct. at 1070, 103 L.Ed.2d at 349.) In *Butler v. McKellar* (1990), 494 U.S. ____, 110 S.Ct. 1212, 108 L.Ed.2d 347, the Court said that if prior to the rule's being established there was a significant difference of opinion on the issue in the lower courts, this would indicate that a decision is a new rule and not merely an application of an earlier decision to a different set of facts. *Butler*, 494 U.S. at ____, 110 S.Ct. at 1217-18, 108 L.Ed.2d at 356-57.

We conclude that *Reddick* did constitute a new rule. Though *Reddick* was doctrinally consistent with existing laws regarding affirmative defenses and burdens of proof, it was the first time this court applied these legal principles to the specific situation of the murder and voluntary manslaughter instructions. In applying these principles, not only did the court determine that the instructions were erroneous, it also ruled that, as written, they implicated constitutional rights. This conclusion did not necessarily flow from the statutory analysis. (See *Patterson v. New York* (1977), 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281.) Also, this "result was not *dictated* by precedent existing at the time." (Emphasis in original.) (*Teague*, 489 U.S. at 301, 109 S.Ct. at 1070, 103 L.Ed.2d at 349.) Instead, the long-standing practice in the trial courts was to instruct the jury on murder and voluntary manslaughter consistent with the Illinois Pattern Jury Instructions. This court also did not invalidate these instructions in other

cases it reviewed prior to *Reddick*. (See *People v. Almo* (1985), 108 Ill.2d 54, 90 Ill.Dec. 885, 483 N.E.2d 203; *People v. Hoffer* (1985), 106 Ill.2d 186, 88 Ill.Dec. 20, 478 N.E.2d 335 (although court noted that instructions should be amended).) Moreover, prior to this court's ruling that the State has the burden to negate the voluntary manslaughter mitigating mental states, at least one panel of the appellate court had ruled that the State did not bear this burden. (*People v. March* (1981), 95 Ill.App.3d 46, 50 Ill.Dec. 763, 419 N.E.2d 1212; see *Butler*, 494 U.S. at ____, 110 S.Ct. at 1217-18, 108 L.Ed.2d at 356-57 (difference of opinion in lower courts indicates that rule is new).) Therefore, under the *Teague* analysis, unless this new rule falls within one of the two exceptions, it will not be applied retroactively.

The first exception states that the new rule should be given retroactive application if it places certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe. (*Teague*, 489 U.S. at 307, 109 S.Ct. at 1073, 103 L.Ed.2d at 353.) This exception does not apply. The conduct proscribed in this case is murder, the prosecution of which is not prohibited by *Reddick*. Nor does the *Reddick* rule involve a categorical guarantee accorded by the Constitution such as a prohibition on the imposition of death on a certain class of offenders. See *Penry v. Lynaugh* (1989), 492 U.S. ____, 109 S.Ct. 2934, 106 L.Ed.2d 256.

Under the second exception, a new rule may be applied on collateral review if it requires the observance of those procedures that are implicit in the concept of ordered liberty. (*Teague*, 489 U.S. at 307, 109 S.Ct. at 1073, 103 L.Ed.2d at 353.) In *Teague*, the Court stated:

> "[W]e believe that Justice Harlan's concerns about the difficulty in identifying both the existence and

> the value of accuracy-enhancing procedural rules can be addressed by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished.
>
> Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge." (489 U.S. at 313, 109 S.Ct. at 1076-77, 103 L.Ed.2d at 358.)

This exception must be narrowly construed and we do not believe that the *Reddick* rule established such a component of basic due process so as to fall within it.

For the above-stated reasons, we conclude that the *Reddick* rule should not be applied retroactively. This holding makes it unnecessary to address the State's argument that the error was harmless because defendant's conviction should be affirmed based on the felony-murder doctrine. Therefore, we reverse the appellate court and affirm the trial court's dismissal of defendant's post-conviction petition.

Appellate court reversed; circuit court affirmed.

(2)

Supreme Court, U.S.
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No. 92-253

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

ILLINOIS DEPARTMENT OF CORRECTIONS,

Petitioner,

-vs-

MARVIN FLOWERS,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Should the Court decline to review the Seventh Circuit's decision where the State has not shown that the decision will have widespread impact or that it will affect more than a few cases?

II. Should the Court decline to review the State's argument that the jury instructions in this case comported with due process where the State conceded, in both the district court and in the court of appeals, that the instructions violated due process and where the argument is without merit?

III. Should the Court decline to review the State's argument, based on Teague v. Lane, 489 U.S. 288 (1989), that a prior decision of the Seventh Circuit, Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990), should be denied retroactive effect where the State repeatedly elected not to raise this argument in previous habeas cases and where the State's claim lacks merit?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 3

I

THIS COURT SHOULD DENY THE STATE'S PETITION FOR CERTIORARI BECAUSE THE STATE HAS GROSSLY EXAGGERATED THE IMPACT OF THE SEVENTH CIRCUIT'S DECISION 3

II

THIS COURT SHOULD REJECT THE STATE'S CLAIM THAT NO DUE PROCESS VIOLATION OCCURRED BECAUSE THE STATE CONCEDED BEFORE BOTH THE DISTRICT COURT AND COURT OF APPEALS THAT THE INSTRUCTIONS AT ISSUE HAD, IN FACT, VIOLATED DUE PROCESS AND BECAUSE THE ARGUMENT FAILS ON THE MERITS 6

III

THIS COURT SHOULD REJECT THE STATE'S BELATED ATTEMPT TO APPLY TEAGUE V. LANE, 489 U.S. 288 (1989), TO FALCONER V. LANE, 905 F. 2D 1129 (7TH CIR. 1990), BECAUSE THE STATE FAILED TO RAISE THIS ISSUE IN THREE PRIOR CASES, INCLUDING FALCONER V. LANE AND BECAUSE THE CLAIM LACKS MERIT 9

Conclusion 14

TABLE OF AUTHORITIES

Cases — Page

Adickes v. Kress & Co., 398 U.S. 144 (1970) 7

Butler v. McKellar, 494 U.S. 407 (1990) 13

Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990) 10

Desist v. United States, 394 U.S. 244 (1969) (Harlan, J., dissenting) 10

Duignan v. United States, 274 U.S. 195 (1927) 7

Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990) . . . . . passim

Griffith v. Kentucky, 479 U.S. 314 (1987) 10

Husty v. United States, 282 U.S. 694 (1931) 7

Illinois Department of Corrections v. Flowers, 962 F.2d 703 (7th Cir. 1992) 7

Lawn v. United States, 355 U.S. 339 (1958) 7

Patrick v. Burget, 486 U.S. 94 (1988) 6

Penry v. Lynaugh, 492 U.S. 302 (1989) 12

Rose v. Lane, 910 F.2d 400 (7th Cir. 1990) 5, 11

Sawyer v. Smith, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) . 13

Taylor v. Gilmore, 954 F.2d 441 (7th Cir. 1992) 3, 5, 7

Teague v. Lane, 489 U.S. 288 (1989) . . . . . passim

United States ex rel. Flowers v. Illinois Department of Corrections, 767 F. Supp. 880 (N.D. Ill. 1991) 7

United States ex rel. Fleming v. Huch, 924 F.2d 679 (7th Cir. 1991) 5, 6, 11

Youakim v. Miller, 425 U.S. 231 (1976) 6

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ILLINOIS DEPARTMENT OF CORRECTIONS,

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

A copy of the relevant decisions including the May 7, 1992, decision of the United States Court of Appeals for the Seventh Circuit are appended to the certiorari petition.

JURISDICTION

This Court maintains jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In its statement of the case, the State writes, "An Illinois jury found Flowers guilty of murder, armed violence and armed robbery on October 11, 1980." State's Petition at 3. While this is accurate as far as it goes, it should be noted that, having received the instructions at issue here, the twelve jurors also initially returned a verdict finding Marvin Flowers guilty of voluntary manslaughter. The trial judge refused to accept both the murder and manslaughter verdicts, gave the jury supplemental oral instructions, and sent the jury back for further deliberations. When the jury, apparently confused by the instructions, returned without reaching a verdict, the trial

judge gave additional oral instructions and sent the jury to deliberate a third time. The jury then returned with a murder verdict but without the manslaughter verdict. The trial judge accepted the murder verdict and subsequently entered judgment on it.

REASONS FOR DENYING CERTIORARI

I

THIS COURT SHOULD DENY THE STATE'S PETITION FOR CERTIORARI BECAUSE THE STATE HAS GROSSLY EXAGGERATED THE IMPACT OF THE SEVENTH CIRCUIT'S DECISION.

In its reasons for granting the writ, the State contends that the Seventh Circuit's decision in this case is "momentous" and has "ominous national implications." State's Petition at 5. The State further implies that a "calamity" will befall the State of Illinois if the appellate court's decisions in this case and in Taylor v. Gilmore, 954 F.2d 441 (7th Cir. 1992) are allowed to stand because hundreds of murderers convicted over the past twenty years will be set free. State's Petition at 5-6. Neither claim by the State is well-founded.

First, the State's suggestion that the Seventh Circuit's decisions will affect hundreds of murder convictions appears hyperbolic to say the least. Despite the State's suggestion to the contrary, the deficient murder instructions were not given routinely over the span of twenty years. Between 1961 and 1981,

the prevailing case law and the pattern jury instructions did not suffer from the deficiency identified in Falconer v. Lane, 905 F. 2d 1129 (7th Cir. 1990). Rather, the pattern jury instructions which the Seventh Circuit concluded violated due process were promulgated in 1981 with the publication of the second edition of Illinois Pattern Instructions Criminal (IPI Criminal 2d ed. 1981). Effective July 1, 1987, the entire statutory scheme was amended, abolishing the former offenses of murder and manslaughter and creating the offenses of first and second degree murder in their place. The jury instructions were completely revised to reflect the new scheme. Then, in 1988, the Illinois Supreme Court invalidated the previous murder-manslaughter instructions in People v. Reddick, 123 Ill. 2d 184, 526 N.E.2d 141 (1988). Thus, the Seventh Circuit's decision will apply primarily to murder convictions obtained during the six or seven year period between 1981 and 1987-88.[1]

However, not even all murder convictions between 1981 and 1988 will be affected by the appellate court's ruling. The appellate court's decision will have no impact upon murder convictions where a jury was not instructed on voluntary manslaughter. Where murder convictions were attained on pleas of guilty, where murder convictions were secured in bench trials, or

[1] Respondent's case is somewhat of an anomaly in that he was tried prior to 1981 when Illinois' pattern murder instruction did not suffer from the defect identified in Falconer. In Flowers' case, the trial judge simply did not give the pattern instructions in effect but for some reason gave non-pattern instructions which coincidentally happened to suffer from the same defect as the later pattern instructions.

where defendants presented no colorable case for voluntary manslaughter sufficient to warrant an instruction (which would presumably include most death penalty cases), the Seventh Circuit's decision will have no application whatsoever.

As evidence of the fact that the Seventh Circuit's decision will have limited effect, to date there are only five reported appellate court cases (including this case) where defendants have sought and obtained habeas relief on the basis of the unconstitutional murder instruction. See Falconer v. Lane, 905 F. 2d 1129 (7th Cir. 1990); Rose v. Lane, 910 F.2d 400 (7th Cir. 1990); United States ex rel. Fleming v. Huch, 924 F.2d 679 (7th Cir. 1991) Taylor v. Gilmore, 954 F.2d 441 (7th Cir. 1992); Illinois Department of Corrections v. Flowers, 962 F.2d 703 (7th Cir. 1992). As further evidence that the State's claims of statewide disaster are overstated, it should be noted that the State did not even bother to file petitions for certiorari in Falconer or Fleming and failed to raise any retroactivity issue in Falconer, Rose, or Fleming. The State's prior indifference to the holding of Falconer and its retroactive application is difficult to reconcile with its present claim that the decisions are "ominous", "calamitous," and "momentous."

Second, the State fails to explain what national implications are involved here. The Seventh Circuit's decision held that a murder instruction given primarily over a seven year period in a limited number of murder cases violated due process. Why a decision dealing with the retroactive effect of a murder

instruction unique to Illinois is likely to have nationwide effect is unclear. Because the State's hyperbolic claims concerning the effect of the Seventh Circuit's decision are unwarranted and because it appears that the decision will affect relatively few cases, the State's petition for certiorari should be denied.

II.

THIS COURT SHOULD REJECT THE STATE'S CLAIM THAT NO DUE PROCESS VIOLATION OCCURRED BECAUSE THE STATE CONCEDED BEFORE BOTH THE DISTRICT COURT AND THE COURT OF APPEALS THAT THE INSTRUCTIONS AT ISSUE HAD, IN FACT, VIOLATED DUE PROCESS AND BECAUSE THE ARGUMENT FAILS ON THE MERITS.

In its Petition for Writ of Certiorari, the State of Illinois asks this Court to grant certiorari "to resolve a circuit split on the proper scope of the due process clause." (State's Petition at 5). This constitutional issue was never raised by the State in either the district court or the Seventh Circuit. Because the State has provided no excuse for not having raised this issue in the court below, this Court should deny the petition. See Patrick v. Burget, 486 U.S. 94, 99, n.5 (1988) citing Youakim v. Miller, 425 U.S. 231, 234 (1976) (Per curiam).

The opinion of the district court below explicitly states "As respondent concedes, [United States ex rel.] Fleming [v. Huch], 924 F. 2d 679 [(7th Cir. 1991)] puts to rest any question

that the initial written instructions did not violate due process because they were inherently confusing." United States ex rel. Flowers v. Illinois Department of Corrections, 767 F. Supp. 880, 892 (N.D. Ill. 1991). Moreover, the Seventh Circuit's opinion likewise noted that Illinois conceded this point. See Flowers v. Illinois Department of Corrections, 962 F.2d 703, 705 (7th Cir, 1992). This failure of the State to challenge the constitutionality of the written instructions below militates in favor of denying the petition for certiorari. Patrick, 486 U.S. at 99, n.5 ("This court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court"); Adickes v. Kress & Co., 398 U.S. 144, 147, n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them") citing Lawn v. United States, 355 U.S. 339, 362-3, n.16 (1958); Husty v. United States, 282 U.S. 694, 701-02 (1931); Duignan v. United States, 274 U.S. 195, 200 (1927).

The State's decision to forego this argument before the lower courts speaks volumes on the merits of the claim. Moreover, the Seventh Circuit's opinion in Taylor v. Gilmore, 954 F.2d 441 (7th Cir. 1992), authored by Judge Flaum and joined in by Judges Posner and Manion, fully explains the due process violation in this case. See Taylor, 954 F.2d at 450.

The thrust of the State's belated due process argument is that the Seventh Circuit, in disregard of this Court's prior

decisions, announced that criminal defendants are entitled to correct jury instructions on affirmative defenses. See State's Petition at 6, 13-19. The State argues that this holding is incorrect under this Court's decisions in Patterson v New York, 432 U.S. 197 (1977), Engle v. Isaac, 456 U.S. 107 (1982), and Martin v. Ohio, 480 U.S. 228 (1987).

This argument is premised on distortions both of the issue in this case and of the Seventh Circuit's holding. The instruction challenged in this case was not the instruction on voluntary manslaughter, which in Illinois acted in some respects as a partial affirmative defense (although it was also a completely separate offense). Marvin Flowers has never claimed that the voluntary manslaughter instruction was erroneous, confusing, or constitutionally deficient. It was the murder instruction which was challenged in this case and it was the murder instruction which the Seventh Circuit held unconstitutional. The State ignores this salient fact in an attempt to bring this case within Patterson, Engle, and Martin when those cases dealing with instructions on affirmative defenses are not on point.

The State's failure to raise any due process issue in the lower courts and the argument's lack of merit warrants a denial of its petition for certiorari.

III.

THIS COURT SHOULD REJECT THE STATE'S BELATED ATTEMPT TO

APPLY TEAGUE V. LANE, 489 U.S. 288 (1989), TO FALCONER V. LANE, 905 F. 2D 1129 (7TH CIR. 1990), BECAUSE THE STATE FAILED TO RAISE THE ISSUE IN THREE PRIOR CASES, INCLUDING FALCONER V. LANE AND BECAUSE THE CLAIM LACKS MERIT.

The centerpiece of the State of Illinois' Petition for Certiorari is a Teague v. Lane, 489 U.S. 288 (1989), attack on Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990), a two year-old Seventh Circuit habeas corpus decision. This Court should deny the petition for certiorari because the State of Illinois failed to raise this Teague challenge in the Falconer case itself. Moreover, the State of Illinois failed to raise Teague v. Lane in two subsequent Seventh Circuit decisions granting writs of habeas corpus on the basis of Falconer. Denying the State of Illinois' petition will show that the State may not pick and choose when to raise a Teague v. Lane challenge.

In the case at bar, the Seventh Circuit applied existing precedent--its holding in Falconer v. Lane, 905 F. 2d 1129 (7th Cir. 1990--in granting a writ of habeas corpus. Flowers, 962 F.2d at 705. In its Petition for Writ of Certiorari, the State of Illinois is now asking this Court to hold that the granting of the writ of habeas corpus in Falconer was barred by this Court's decision in Teague. Note that the State is not claiming that the opinion in the case at bar created a new rule under Teague; rather, it is claiming that Falconer--a decision over two years old--violated Teague.

Interestingly, the State of Illinois never raised a Teague

issue in Falconer. The failure to raise the issue two years ago is proof that the State's position is untenable. Yet to appreciate fully the audacity of the State's position, it is important to understand the chronology of events affecting these issues.

On February 22, 1989, this Court decided Teague v. Lane, which held that new rules of criminal procedure should generally not be applied retroactively to cases on collateral review. This Court characterized retroactivity as a "threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." Teague, 489 U.S. at 300. This Court has held that the Teague rule is not "jurisdictional" in the sense that a court must raise and decide the issue sua sponte. See Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 2718, 111 L. Ed. 2d 30 (1990). Rather, the goal of Teague is to prevent "'selective application of new rules [thus] violat[ing] the principle of treating similarly situated defendants the same'." Teague, 489 U.S. at 304, quoting Griffith v. Kentucky, 479 U.S. 314, 323-324 (1987) citing Desist v. United States, 394 U.S. 244, 258-259 (1969) (Harlan, J., dissenting).

As shown below, the State's belated Teague claim subverts the goal of Teague--similar treatment for similarly situated defendants.

The State of Illinois filed its brief in Falconer v. Lane on

October 13, 1989. Note that this is almost eight months after Teague v. Lane was decided. Its brief makes no mention of Teague v. Lane. Oral argument in Falconer was held February 26, 1990--over one full year after Teague v. Lane was decided. Again, the State of Illinois apparently made no use of Teague v. Lane. Indeed, in its opinion in Falconer the Seventh Circuit pointedly noted that the State had failed to raise a Teague v. Lane claim, thus obviating any need to even discuss the case. Falconer v. Lane, 905 F.2d at 1137.

Obviously, the State felt that Teague was inapplicable to a Falconer claim. Any lingering doubt on this score had to be removed when the Seventh Circuit relied on Falconer in granting a habeas corpus petition in Rose v. Lane, 910 F.2d 400 (7th Cir. 1990), cert. denied, 111 S.Ct. 515 (1990), and United States ex rel. Fleming v. Huch, 924 F.2d 679 (7th Cir. 1991). Both cases concerned the same faulty Illinois jury instructions; both decisions relied on Falconer in granting relief; in neither case did the State of Illinois raise a Teague v. Lane claim.

The State of Illinois long ago lost the right to raise a Teague claim against the Falconer decision. Granting this petition would allow a State to flout the holding of Teague v. Lane by arbitrarily discriminating among similarly situated defendants. Granting this petition would open the door to a defendant's claim that the State had an "improper motive" in singling him out for a Teague v. Lane claim.

The State's decision not to make a Teague argument in case

after case illustrates the weakness of the claim. In this Court, the State argues that Falconer was a new rule and that Judge Easterbrook's disagreement with Falconer two years after the fact is proof that Falconer was not "dictated" by prior precedent. State's Petition at 12. The State also seems to contend that, if there is any contrary authority, the decision must be considered new within the meaning of Teague.

This Court's decision in Penry v. Lynaugh, 492 U.S. 302 (1989), demonstrates that this approach is wrong. Both the Texas Court of Criminal Appeals and the Fifth Circuit had rejected petitioner's claim in Penry. Nevertheless, this Court agreed with the claim and then held that it was dictated by previous precedent and that the opposite conclusion was not a reasonable, good faith interpretation of the precedents. Thus, simply because there may be disagreement on the constitutionality of a certain procedure, this does not necessarily establish that a constitutional rule is new.

Additionally, it must be noted that the State's Teague argument is based on the same fundamental distortion of the issue in this case as is its due process argument. See supra at 8. The State claims that other circuit courts of appeal have expressly rejected the Falconer and Taylor court's reasoning, citing Allen v. Redman, 858 F.2d 1194 (6th Cir. 1988); Wood v. Marshall, 790 F.2d 548 (6th Cir. 1986), cert. denied, 479 U.S. 1036 (1987); Walker v. Endell, 850 F.2d 470 (9th Cir.), cert. denied, 488 U.S. 926 (1988). State's Petition at 18-19. As each

of those cases was decided before either Falconer or Taylor, it is difficult to see how they expressly rejected the reasoning of Falconer and Taylor. More importantly, however, each of those cases dealt with a defendant's due process right to instructions on an affirmative defense. It bears repeating that it is not the constitutionality of the voluntary manslaughter instruction or the defendant's right to such an instruction that is at issue here. Rather it is the validity of the murder instruction.

Finally, even if Falconer announced a new rule, the new rule falls squarely within one of the exceptions to non-retroactivity recognized in Teague and its progeny. The relevant exception provides for retroactive application of watershed rules of criminal procedure which affect "fundamental fairness" and go to "the likelihood of obtaining an accurate conviction. Teague v. Lane, 489 U.S. 288, 312 (1989); Sawyer v. Smith, 110 S. Ct. 2822, 111 L. Ed. 2d 193, 211 (1990); Butler v. McKellar, 494 U.S. 407 (1990).

In the present case, the Falconer error (the absence of any reference to the presence or absence of an unreasonable belief of justification in the murder instruction) undermined the accuracy of the fact-finding process in a fundamental way. The jury, in finding the defendant guilty of voluntary manslaughter (see Respondent's Statement of the Case, supra at 2) found beyond a reasonable doubt the presence of an unreasonable belief of justification--meaning it found a fact incompatible with a conviction for murder. Nevertheless, it signed a murder verdict

in accordance with a murder issues instruction which took no account of the presence of absence of an unreasonable belief of justification. One could hardly imagine an error that goes more to the accuracy or the fundamental fairness of the procedure. Flowers argued below that this exception to Teague applies to him and the State makes no argument to the contrary in its petition.

Because the State has chosen to invoke Teague in a random, arbitrary manner, because its argument on the merits is ill-founded, and because, given the unique facts of his case, Marvin is entitled to relief under one of Teague's exceptions, this Court should deny the State's petition for a writ of certiorari.

CONCLUSION

For these reasons, respondent Marvin Flowers submits that the petition for writ of certiorari should be denied.

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No. 92-253

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ILLINOIS DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

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WASHINGTON, D.C. 20543

MARVIN FLOWERS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
ARGUMENT	1
I. THE PETITION FOR CERTIORARI ACCURATELY PORTRAYS THE SIGNIFICANCE OF THE DECISION BELOW	1
II. THE FIRST QUESTION PRESENTED IN THE PETITION FOR CERTIORARI WAS AMPLY PRESERVED IN THE LOWER COURTS	4
III. THE LAW PERMITS THE DEPARTMENT TO RAISE THE FIRST QUESTION PRESENTED IN THE PETITION FOR CERTIORARI EVEN THOUGH THE ISSUE WAS NOT RAISED IN EARLIER CASES	5
CONCLUSION	9

TABLE OF AUTHORITIES

CASES	PAGE(S)
Beck v. Alabama, 447 U.S. 625 (1980)	4
Engle v. Isaac, 456 U.S. 107 (1982)	4
Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990)	4, 5
Flowers v. Illinois Dep't of Corrections, 962 F.2d 703 (7th Cir. 1992)	3
Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962)	6
Martin v. Ohio, 480 U.S. 228 (1987)	4

Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944) 6

Patterson v. New York, 432 U.S. 197 (1977) ... 4

Penry v. Lynaugh, 492 U.S. 302 (1989) 7, 8

Sawyer v. Smith, 110 S. Ct. 2822 (1990) 4, 8-9

Taylor v. Gilmore, 954 F.2d 441 (7th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3783 (May 19, 1992) (No. 91-1738) ..... *passim*

Teague v. Lane, 489 U.S. 288 (1989) ..... *passim*

Wade v. United States, 112 S. Ct. 1840 (1992) ... 7

In re Winship, 397 U.S. 358 (1970) 8

MISCELLANY

ILLINOIS SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL (1968) 2

ILLINOIS SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL (2d ed. 1981) 2

JAMES W. MOORE, JO D. LUCAS & THOMAS S. CURRIER, MOORE'S FEDERAL PRACTICE (2d ed. 1991) 6

UNITED STATES DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1988 (1989) ... 3

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ARGUMENT

I.

THE PETITION FOR CERTIORARI ACCURATELY PORTRAYS THE SIGNIFICANCE OF THE DECISION BELOW.

Despite Flowers's contention to the contrary, the decision below and *Taylor v. Gilmore*, 954 F.2d 441 (7th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3783 (May 19, 1992) (No. 91-1738), will indeed have momentous consequences for Illinois and the nation.

First, Flowers asserts that these decisions will not likely affect hundreds of murder convictions because the pattern instructions required the allegedly unconstitutional jury charge only between 1981 and 1987. Flowers fails to note, however, that the pattern instructions in existence from 1968 through 1981 also permitted the same error to occur. In the first edition of the pattern instructions, published in 1968, instruction 7.02 governed murder charges and instruction 7.06 governed the type of voluntary manslaughter relevant to this case. ILLINOIS SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL Instructions 7.02 & 7.06 (1968) (hereafter "I.P.I. CRIMINAL—1ST ED."). If a court used these two instructions, as Flowers's state trial judge did, then the *Reddick* problem would occur because instruction 7.02 did not state that the prosecution had to prove the absence of voluntary manslaughter.

Instruction 27.01, also appearing in the first edition of the pattern instructions, would have avoided the *Reddick* problem because it included the absence of voluntary manslaughter as a factor that the prosecution had to prove beyond a reasonable doubt. I.P.I. CRIMINAL—1ST ED. Instruction 27.01. The second edition of the pattern instructions (published in 1981) eliminated the absence-of-manslaughter language of instruction 27.01, however, thereby effectively guaranteeing a *Reddick* problem whenever a court used the pattern instructions. ILLINOIS SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL Instruction 27.01 (2d ed. 1981).

Moreover, between 1968 and 1981, parties frequently overlooked instruction 27.01 and offered instructions at trial based on instructions 7.02 and 7.06 instead. This very case presents a conspicuous example; as Judge Easter-

brook noted below, Flowers "was tried in 1980, but many judges used [the faulty] instructions before the formula was enshrined in the pattern book." *Flowers v. Illinois Dep't of Corrections*, 962 F.2d 703, 708 (7th Cir. 1992) (Easterbrook, J., concurring) (App. 9).

Flowers also suggests that *Taylor* and the decision below will affect only an insignificant number of murder convictions entered between 1981 and 1988. Brief in Opposition, pp. 4-5. Statistical evidence suggests that the opposite is true. In 1986 and 1987 alone, there were 1,465 murder and non-negligent manslaughter offenses known to the police in Chicago, Peoria and Springfield, Illinois. UNITED STATES DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1988 Table 3.119, at 440-44 (1989). If only five percent of these crimes led to convictions on jury verdicts after pattern charges on murder and voluntary manslaughter, more than seventy-three prisoners could potentially have colorable federal habeas corpus claims from these two years alone. Extrapolating back to 1968 and considering that murders occurred in Illinois outside these three cities, a very real chance indeed exists that *Taylor* and the decision below will affect hundreds of final murder convictions.

Finally, the decisions have national implications for two reasons. First, the new rule analysis of *Teague v. Lane*, 489 U.S. 288 (1989), applies to every state habeas proceeding in the federal courts. The Seventh Circuit's severe restriction in *Taylor* of the scope of that analysis will likely encourage other courts to take a similarly cavalier approach to the new-rule inquiry. Second, *Taylor* effectively holds, in explaining its new-rule decision, that criminal defendants have a Due Process right to have a jury consider evidence relating to an affirmative defense. 954 F.2d at 453. This Court essentially reserved the question of

whether the Due Process Clause extends that far in *Beck v. Alabama*, 447 U.S. 625 (1980). *See id.* at 637. Because a circuit split exists on this fundamental question of criminal procedure, the decision presents a national issue.

II.

THE FIRST QUESTION PRESENTED IN THE PETITION FOR CERTIORARI WAS AMPLY PRESERVED IN THE LOWER COURTS.

Flowers asserts that the Department did not preserve below the Petition's first question presented because the Department conceded that the pattern jury instructions violated the Constitution. The first question presented, however, does not raise the constitutionality of the instructions. Rather, it asks the Court to decide whether *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), which (as modified by *Taylor*) radically expanded an already controversial proposition on a fundamental aspect of criminal procedure, applies retroactively. Contrary to Flowers's argument, the Petition points to a circuit split only as evidence that "reasonable jurists may disagree" over the constitutionality of the instructions and that therefore *Falconer* and *Taylor* announced a new rule under *Teague. Sawyer v. Smith*, 110 S. Ct. 2822, 2827 (1990).

On the merits of the issue of whether *Falconer* and *Taylor* are consistent with *Patterson v. New York*, 432 U.S. 197 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982); and *Martin v. Ohio*, 480 U.S. 228 (1987), Flowers attempts to distinguish those latter cases, arguing that they do not control because he only challenges the constitutionality of the murder instruction and not the voluntary manslaughter instruction. Brief in Opposition, p. 8. The murder charge by itself, however, was perfectly constitutional; it required the State to prove, beyond a reasonable doubt, all the ele-

ments of the offense. As the Seventh Circuit has repeatedly explained, the murder and voluntary manslaughter instructions "were fine when read separately." *Taylor*, 954 F.2d at 450 (citing *Falconer*, 905 F.2d at 1135).

Only the addition of the voluntary manslaughter issue made the instructions incorrect because, taken together, the instructions did not tell the jury the significance of the voluntary manslaughter evidence. *Taylor*, 954 F.2d at 452-53. Flowers is simply wrong, therefore, to argue that "it was [only] the murder instruction which the Seventh Circuit held unconstitutional." Brief in Opposition, p. 8.

III.

THE LAW PERMITS THE DEPARTMENT TO RAISE THE FIRST QUESTION PRESENTED IN THE PETITION FOR CERTIORARI EVEN THOUGH THE ISSUE WAS NOT RAISED IN EARLIER CASES.

Flowers argues essentially that the Court should not grant certiorari on the first question presented in the Petition because the law collaterally estops the Department from raising the question. Flowers's argument conflicts with long-accepted principles of collateral estoppel, so the Court should reject it.

Flowers argues that the State of Illinois elected not to raise, in certain earlier cases, the legal issue of whether *Falconer* applies retroactively on habeas corpus review. He concludes that the Court should not grant certiorari to resolve the question in this case even though the question of retroactivity was raised and resolved on its merits in this case in the federal district court and the Seventh Circuit.

A litigant has no obligation, however, to raise every available legal issue in every lawsuit. The Court has re-

peatedly held that collateral estoppel does not bar litigation of an issue that a party could have presented in an earlier case but elected not to raise for whatever reason. *See, e.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590, 597 (1962) (Goldblatt's victory in the first suit brought on one ground did not bar the town from presenting a different theory of recovery in a later suit); *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 669-70 (1944) (election not to raise a defense in an earlier action did not preclude raising it in a later suit); 1B JAMES W. MOORE, JO D. LUCAS & THOMAS S. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.443[3], at 773 (2d ed. 1991) (when a defendant elects not to raise a defense, judgment for the plaintiff is res judicata for the plaintiff's cause of action, but "it does not conclusively establish the absence of the defense for collateral purposes.").

Furthermore, the logic of Flowers's argument would lead to absurd results. Flowers would have this Court forever foreclose the possibility of certiorari review of an issue just because a party did not raise the issue in the first possible case that permitted it. A party, however, should have discretion to decide not to raise an issue without worrying that it might be foreclosed from presenting it to this Court in a later, unrelated case. Parties, especially state parties in habeas corpus cases, decide what issues to raise in lawsuits based on many different considerations; the law of collateral estoppel should not compel them to raise every possible issue in every case.

Moreover, Flowers's secondary argument, that applying *Teague* to *Falconer* would violate *Teague's* policy of treating similarly situated defendants the same, is puzzling at best. *Teague* indeed states that the retroactivity doctrine should treat similarly situated prisoners the same. 489 U.S. at 304. The various state respondents' decisions

not to press a *Teague* claim in some earlier *Reddick* error habeas corpus cases, however, did not alter this policy of the retroactivity doctrine. The *law* still treats similarly situated habeas petitioners similarly; those earlier state respondents simply did not assert all their legal rights.

Flowers also suggests that "[g]ranting this petition would open the door to a defendant's claim that the State had an 'improper motive' in singling him out for a *Teague v. Lane* claim." Respondent's Brief in Opposition, p. 11. *Wade v. United States*, 112 S. Ct. 1840 (1992), however, suggests the opposite result. In *Wade*, the Court held that Wade had made no "substantial threshold showing" that the government had violated his constitutional rights by refusing to seek a downward departure from the federal sentencing guidelines based on an improper motive. 112 S. Ct. at 1844. Even if a state employee can violate a habeas petitioner's constitutional rights by asserting a *Teague* defense based on an improper motive (which this Court has apparently never held), Flowers, like Wade, has presented no substantial threshold showing that the Department acted with any improper motive.

Next, Flowers cites *Penry v. Lynaugh*, 492 U.S. 302 (1989), to argue that Judge Easterbrook's concurrence and the conflicting decisions from other circuits do not illustrate the novelty of the holding below. Preliminarily, Flowers does not dispute the Petition's discussion of Judge Easterbrook's concurrence or the circuit split on this aspect of the Due Process Clause; he only argues that "disagreement on the constitutionality of a certain procedure . . . does not necessarily establish that a constitutional rule is new." Brief in Opposition, p. 12. Flowers does not contest that a disagreement exists.

Reasonable disagreement, like that over the scope of the Due Process Clause in the *Reddick* cases, indeed re-

quires a court to find the rule "new" under *Teague*. *Sawyer v. Smith*, 110 S. Ct. at 2827. The extensive judicial disagreement in the *Reddick* cases is much more reasonable than that presented by the lower courts in *Penry*. In *Penry*, this Court merely applied an existing constitutional principle to the specific facts of Penry's case. 492 U.S. at 314-19. By contrast, the decision below and *Taylor* apply a rule that has caused extreme confusion in the courts, that other circuits have explicitly rejected, and that may well be wrong under this Court's precedent. As Justice Scalia wrote in *Penry*, "[i]t seems . . . utterly impossible to say that a judge acting in good faith and with care should have known the rule" applied below. 492 U.S. at 353 (Scalia, J., concurring in part and dissenting in part). The reasonableness of the judicial disagreement—not its mere existence—renders the *Taylor* holding new under *Teague*.

•

Finally, Flowers correctly notes that *Teague* still permits retroactive application of "watershed rules of criminal procedure" even if they are "new." *Teague*, 489 U.S. at 311 (1989). Contrary to Flowers's argument, however, neither *Taylor* nor *Falconer* announced such a fundamental principle. At most, these decisions apply *In re Winship*, 397 U.S. 358 (1970), to a new factual setting. *Winship* held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. *Falconer* and *Taylor* expand that holding to include facts relating to affirmative defenses. If any case established a watershed rule of criminal procedure relating to the Due Process Clause's requirements for burdens of proof and elements of crimes, *Winship* did so, not *Falconer* or *Taylor*. *See Sawyer v. Smith*, 110 S. Ct. at 2831-33 (proposed rule did not meet

this *Teague* exception because, even though it would improve trial accuracy, it would not " 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding.") (quoting *Teague*, 489 U.S. at 311).

CONCLUSION

The Brief in Opposition presents no sound reason to deny a writ of certiorari on the first question presented in the Petition. This Court should grant the writ.

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